UNITED
NATIONS

AT

Administrative Tribunal

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18 May 1990

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 478

Case No. 517: SUNDARAM

Against: The Secretary-General of the International Civil Aviation Organization

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, Vice-President, presiding; Mr. Francisco A. Forteza; Mr. Ioan Voicu;

Whereas, on 22 June 1989, Sylvia Sundaram, a staff member of the International Civil Aviation Organization, hereinafter referred to as ICAO, filed an application, the pleas of which read as follows:

"Section II - Pleas

I request that:

a) the decision of the Secretary-General of ICAO (...) dated 26 January 1989 not to grant dependency benefits in regard to my spouse be rescinded;

b) the decision of the Secretary-General dated 1 May 1989 (...) not to grant any retroactive and future dependency benefits to me in regard to my husband be rescinded;

c) the Secretary-General of ICAO be ordered to pay dependency benefits to me in respect of my husband retroactively for the maximum period allowed under the Rules of the Organization;

d) The Secretary-General of ICAO be ordered to continue to pay dependency benefits to me in respect of my husband from 1 January 1989."

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Whereas the Respondent filed his answer on 19 September 1989;

Whereas, on 27 March 1990, the President of the Tribunal, pursuant to article 10 of the Rules of the Tribunal, put questions to the Respondent and on 4 May 1990, the Respondent provided answers thereto;

Whereas the facts in the case are as follows:

The Applicant has been employed by ICAO since 1 March 1961. She currently holds a permanent appointment at the General Service, G-8 level, as a Personnel Clerk in the Technical Assistance Bureau. She is married to Chittur S. Sundaram, a former staff member of ICAO, and a recipient of a pension from the United Nations Joint Staff Pension Fund (UNJSPF).

In a Circular Memorandum dated 31 May 1988, the Administration announced to staff in receipt of a dependent spouse allowance, the requirements to qualify for the allowance and the administrative procedures to be followed in order to file a claim therefor. In accordance with ICAO Staff Regulation 3.7:

> "...
>
> 1. A dependent spouse shall be a spouse whose occupational earnings, if any, in any calendar year for which an entitlement is claimed, do not exceed the lowest entry level of the United Nations General Service gross salary scales applicable to the place of work of the staff member's spouse ...".

Attached to the Circular was a form entitled "Application for Dependent Spouse Benefits" which contained a footnote with a definition of "occupational earnings". According to the definition, "occupational earnings" includes:

> "... the total gross salary from employment before any tax deductions or obligatory contributions ... income from other sources (e.g. pension, annuities, rental income, investment income, grants, scholarships, etc) is not included in the 'occupational earnings'."

On 3 June 1988, the Applicant, who had, until then, been under the impression that she was not entitled to claim a dependency allowance for her husband, requested payment of the allowance on the ground that, according to

footnote (d) of the attachment to the Circular Memorandum, "only occupational earnings are considered in determining dependency status". She noted that she was "unaware that pension benefits were not considered as 'income'" and requested retroactive payment of the allowance "on a retroactive basis up to the maximum permissible time period".

In a reply dated 11 July 1988, the Chief, Personnel Branch, approved payment of the spouse allowance from 31 May 1988 only, the date of the Circular Memorandum in which "a new definition of occupational earnings adopted by the Organization effective 31 May 1988 and superseding any previous definition or interpretation given to the word occupational earnings of Staff Regulation 3.7" had been given.

On 23 August 1988, the Applicant asked the Chief, Personnel Branch, to reconsider his decision not to pay her a spouse allowance retroactively. She argued essentially that the Staff Regulations and Rules refer to occupational earnings and that the clarification contained in the Circular Memorandum had not changed the intent of the rules itself.

In a reply dated 16 December 1988, the Chief, Personnel Branch, informed the Applicant that the question of defining occupational earnings had been reviewed and the Secretary-General had decided, on 7 December 1988, to issue a new paragraph to Personnel Instruction PI/3.7 stating that:

> "Periodic pension payments, with the exception of those deriving solely from a private superannuation plan, and unemployment benefit, shall be considered as occupational earnings ...".

As regards her claim, he confirmed that the previous definition in footnote (d) of the attachment to the Circular Memorandum of 31 May 1988 had been "a new definition of occupational earnings effective from the same date of that circular memo".

On 13 January 1989, the Applicant requested the Secretary-General to review the administrative decision not to pay her a dependent spouse allowance, "both on a retroactive and continuing basis". On 26 January 1989, the Secretary-General informed the Applicant that he could not accede to her request for administrative review.

On 16 February 1989, the Applicant lodged an appeal with the Advisory Joint Appeals Board (AJAB). The Board adopted its report on 18 April 1989. Its recommendation reads as follows:

"RECOMMENDATION

In view of the above, the Board unanimously recommends that the Secretary-General review his decision and that the Appellant be paid the dependent spouse allowance covering a five-month period from 1 January 1988 to 31 May 1988 which would complete the payment for the entire calendar year 1988.

The Board rejected the Appellant's request for payment of the dependent spouse allowance beyond 31 December 1988 as unfounded in facts and in law."

On 1 May 1989, the Secretary-General decided to:

"...

... accept the recommendation of the Board and order that Mrs. S. Sundaram be paid dependent spouse allowance for the period 1 January to 31 May 1988, thus completing the payment for the entire calendar year.

In all other respects the claim of Mrs. S. Sundaram is unfounded in facts and in law; it is also unfounded in equity since Mrs. Sundaram's husband is not economically dependent on her. Consequently, in that respect the appeal stands rejected by the Advisory Joint Appeals Board and I accept this recommendation."

On 2 May 1989, the Secretary of the AJAB transmitted to the Applicant a copy of the AJAB report, together with the Secretary-General's decision thereon.

On 22 June 1989, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The new definition of occupational earnings dated 7 December 1988, including pensions as such, was formulated six months after the Administration had communicated to the staff that pensions could not be considered occupational earnings.

2. The new definition of occupational earnings discriminates against recipients of UN pensions because pensions from private sources, as well as income derived from investments, are not included therein.

3. The new definition of occupational earnings is not applicable to the case since the UNJSPF should be considered by the Administration as a private superannuation plan.

Whereas the Respondent's principal contentions are:

1. The definition stated in footnote (d) of the attachment to the Circular Memorandum of 31 May 1988 was the first definition by the Administration for the term "occupational earnings" and was intended to apply for the future.

2. The pension received by the Applicant's husband exceeds the amount referred to in Staff Regulation 3.7(1) and is excluded in accordance with the new paragraph added to PI/3.7 on 7 December 1988.

3. The UNJSPF cannot be considered as a private superannuation plan because of its special status.

The Tribunal, having deliberated from 2 May to 18 May 1990, now pronounces the following judgement:

I. The questions presented to the Tribunal in this case are:

(a) Whether pensions received may be considered as "occupational earnings" when entitlement to a dependency allowance payable in respect of a "dependent spouse" is limited by only the "occupational earnings" of the spouse;

(b) Whether, if a change is made to exclude pensions from the definition of "occupational earnings", such liberalization has retroactive effect; and

(c) If, when a further change is made to include pensions within the definition of "occupational earnings", which results in depriving a staff member of the continued right to receive the dependency allowance, this amounts to a denial of acquired rights.

II. Before entering into an analysis of these issues, as they apply in the case before the Tribunal, some preliminary observations may be in order. From the inception of the spouse allowance, the dependency of the spouse, which was a condition for its payment, was considered non-existent if the spouse's occupational earnings exceeded a certain amount. No explanation was ever furnished why dependency should be determined solely by reference to the source of the income and not by its amount.

III. In the absence of a satisfactory explanation for this distinction, it is difficult to know what, if any criteria may be considered appropriate to draw a distinction between occupational earnings and pensions derived from an occupation.

IV. The history of the treatment of pensions by ICAO in this context shows that the Organization does not seem to have arrived at a rationale for the distinction, which at one time led it to exclude pensions from occupational earnings and then to include them. In reply to a question put by the Tribunal, the Respondent stated that: "the ICAO Staff Rules and Regulations never defined, prior to 31 May 1988, the term 'occupational earnings' and the first attempt to do so was in the footnote of the Circular Memorandum of 31 May 1988, which specifically excluded pension income from occupational earnings".

V. As a result of the Circular Memorandum of 31 May 1988, which stated that "income from other sources (eg. pension, annuities, rental income, investment income, grants, scholarships, etc) is not included in the 'occupational earnings'", the Applicant submitted a claim in respect of her husband with retroactive effect up to the maximum permissible period. That application was granted without retroactive effect, from 1 June 1988 onwards. On 7 December 1988, a new paragraph was added to Personnel Instruction PI/3.7, that effective 1 January 1989, "periodic pension payments, with the exception of those deriving solely from a private superannuation plan, and unemployment benefit, shall be considered as 'occupational earnings'...". In reply to a further question put by the Tribunal, the Respondent stated that ICAO considered a private superannuation plan to be "a plan for which the employee has been solely responsible for the cost involved and which is established on a voluntary basis".

The Applicant's dependency allowance was discontinued from 1 January 1989, as her husband's pension exceeded the maximum amount allowed for occupational earnings. When the Applicant appealed that decision, she was granted a dependency allowance for the first six months of 1988, but her claim to receive it retroactively for a period prior thereto and prospectively after 1 January 1989, was rejected.

VI. A special feature of the present case is the fact that the pension received by the Applicant's husband is being paid by the United Nations Joint Staff Pension Fund and was earned by the Applicant's husband through his own service with ICAO.

VII. The first question to be determined by the Tribunal is whether it is permissible, under any circumstances, to consider pensions as "occupational earnings". It could be argued that if "occupational earnings", are to be considered earnings derived from an occupation, it would be logical to exclude them from the definition of a pension, as not being from a current occupation. On the other hand, if pensions are considered, as they are in some countries, as "deferred earnings", it would be just as logical to treat them as "occupational earnings". Accordingly, the changes in ICAO's attitude appear to have a rational basis rather than, as alleged by the Applicant, to introduce legislation specially designed to deprive her of her rights.

Whatever the reasons for the variations in approach by ICAO, which led at first to pensions being treated as occupational earnings and then, for a short time, as not being so, and then by the present rule, the Tribunal does not find that they are arbitrary or discriminatory. However, the Tribunal does not look favourably upon frequent fluctuations in the conditions affecting staff members' entitlements. It is preferable to maintain a system, despite doubts concerning its justification, until such time as a definitive conclusion has been reached on what system is to replace it, rather than go back and forth between two systems, particularly if no explanation is furnished for the changes.

READEX FICHE

VIII. The Tribunal finds no reason, in this case, to pronounce on what would be a suitable definition of "occupational earnings". It notes that the most appropriate test to determine whether a dependency allowance ought to be payable or not to a staff member whose spouse is in receipt of a pension would seem to be whether the spouse is or is not economically dependent on the staff member.

IX. The Tribunal must now consider whether the Applicant is entitled to payment of the allowance retroactively. In this connection, the Respondent in his answer argued that "it has been the established practice of the Organization not to exclude pension benefits from 'occupational earnings'". In addition, in reply to a question put by the Tribunal, the Respondent stated that: "Before 31 May 1988, there was no precedent in ICAO of dependency allowance being paid to a staff member whose spouse received pension benefits other than the eligibility threshold set forth in the Staff Rules ...". In light of the considerations set forth above, and being satisfied that it has been the Respondent's consistent practice to treat pensions as "occupational earnings", the Tribunal finds that the Applicant is not entitled to any retroactive payment of the dependency allowance for a period prior to 1 January 1988.

X. The question that remains to be considered is whether, once a change has been made in the definition of dependency, by treating pensions as "occupational earnings", resulting in the loss of the allowance previously being paid, that is a denial of acquired rights to the staff member affected.

The Tribunal has been asked to consider on a number of occasions whether a modification in the pertinent rules could affect an acquired right. It has held that "respect for acquired rights carries with it the obligation to respect the rights of the staff member expressly stipulated in the contract" and that "respect for acquired rights also means that all the benefits and advantages due to the staff member for services rendered before the coming into force of a new rule remain unaffected ...". (Judgement No. 273, Mortished, para. XV, (1981)). The Tribunal finds that in this case the Applicant was not deprived of any acquired rights.

XI. For the foregoing reasons, the application is rejected in its entirety.

(Signatures)

Jerome ACKERMAN
Vice-President, presiding

Francisco A. FORTEZA
Member

Ioan VOICU
Member

Geneva, 18 May 1990

R. Maria VICIEN-MILBURN
Executive Secretary

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ADMINISTRATIVE TRIBUNAL

Judgement No. 479

Cases No. 497: CAINE
No. 511: CAINE

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Roger Pinto, President; Mr. Jerome Ackerman, Vice-President; Mr. Francisco A. Forteza;

Whereas, at the request of Augustus Fahnwulu Caine, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended to 31 January 1989, the time-limit for the filing of an application to the Tribunal in case No. 497 (hereinafter referred to as "the first case");

Whereas, on 31 January 1989, the Applicant filed an application in the "first case", the pleas of which read in part as follows:

"II. PLEAS

7. The Applicant respectfully requests the Administrative Tribunal:

...

(8) To order the Secretary-General:

(a) To rescind his decision of 20 September 1988, arbitrarily and capriciously rejecting the unanimous recommendation of the JAB [Joint Appeals Board] to pay the Applicant compensation for the interest on the withdrawal settlement of his pension benefits due from the Pension Fund since the middle of 1982, constituting thereby a 'miscarriage of justice'.

(b) To pay the Applicant compensation for the interest on the withdrawal settlement of his pension benefits due from the Pension Fund since the middle of 1982 as unanimously recommended by the JAB, as well as interest on the amount of the said compensation from the date of the Respondent's decision of 20 September 1988 until the date of actual payment of the said compensation.

(9) To award the Applicant appropriate amount of damages to the extent of his salary and allowances, with interest, as well as contributions on his behalf and on behalf of the United Nations to the Pension Fund, with interest, retroactive from 29 May 1982, by virtue of the fact that the Administration wilfully kept him on the Payroll of the Organization with ulterior motives, as aforesaid, since 29 May 1982.

(10) To award the Applicant appropriate and adequate compensation for the considerable financial loss and severe moral injuries suffered by him as a direct consequence of the arbitrary and capricious actions taken by the Respondent with ulterior motives, as aforesaid.

(11) To award the Applicant appropriate and adequate compensation for the unreasonable delays in the JAB procedures, constituting thereby a 'denial of justice'.

(12) To award the Applicant, as legal costs, US$3,000.00, as well as appropriate amount representing his travel and other expenses in respect of which a statement of expenses shall be submitted to the Tribunal in the course of the proceedings."

Whereas the Respondent filed his answer on 31 March 1989;

Whereas the Applicant filed written observations on 30 May 1989;

Whereas, at the request of the Applicant, the President of the Tribunal, with the agreement of the Respondent, successively extended to 30 December 1988, 31 January, 28 February, 30 April and 31 May 1989, the time-limit for the filing of an application in case No. 511 (hereinafter referred to as "the second case");

Whereas, on 31 May 1989, the Applicant filed an application in the "second case", the pleas of which read in part as follows:

"II. PLEAS

7. The Applicant respectfully requests the Administrative Tribunal:

...

(21) To order the Respondent, pursuant to Article 9 of its Statute:

(a) To rescind his decision of 10 August 1988 to maintain his decision of 28 May 1982, summarily dismissing the Applicant from the service of the Organization.

(b) To reinstate the Applicant in the service of the Organization retroactive from 29 May 1982.

(c) To pay the Applicant his salary and allowances for the last two weeks of May 1982, which were arbitrarily and capriciously withheld by the Respondent on the pretext of the alleged irregularities in the secret social welfare payments made to the members of the Namibian groups rival to SWAPO [South West Africa People's Organization].

(d) To pay the Applicant his salary and allowances retroactive from 29 May 1982 until the implementation of the judgement on this case.

(e) To make appropriate contributions on behalf of the Applicant and of the Organization to the United Nations Joint Staff Pension Fund retroactive from 29 May 1982.

(22) To reinstate the Applicant in the medical and dental insurance programmes of the United Nations retroactive from 29 May 1982, but to be effective from the date of the judgement on this case.

(23) To award the Applicant appropriate and adequate compensation for considerable financial loss and severe moral injuries suffered by him during the last seven years as a direct consequence of the Respondent's arbitrary, capricious, discriminatory and prejudicial decision of 28 May 1982, summarily dismissing him from the service of the Organization on the pretext of the alleged irregularities in the secret social welfare payments made to members of Namibian groups rival to SWAPO.

(24) To award the Applicant appropriate and adequate compensation for the unreasonable delays in the JAB procedures for over six years, thereby causing a 'denial of justice' in his appeal to the JAB.

(25) To hold oral proceedings on his case in order to hear the Applicant and other witnesses concerned."

Whereas, on 20 June and 20 July 1989, the Applicant amended his pleas, requesting the Tribunal:

"...

7. (25) To hold oral proceedings on the case in order to hear the Applicant and other witnesses, particularly the following:

...

(26) To award the Applicant as legal costs a sum of [US]$3,000.00."

Whereas the Respondent filed his answer on 14 October 1989;

Whereas the Applicant filed written observations on 24 November 1989;

Whereas, on 19 March 1990, the President of the Tribunal ruled that no oral proceedings would be held in the cases;

Whereas, on 29 March 1990, the President of the Tribunal, pursuant to article 10 of the Rules of the Tribunal, put questions to the Respondent and on 5 and 12 April 1990, the Respondent provided answers thereto;

Whereas, on 20 and 25 April and 2 May 1990, the Applicant commented on the Respondent's submissions;

Whereas the facts in the above mentioned cases are as follows:

Augustus Fahnwulu Caine entered the service of the United Nations on 21 October 1970. He was offered a probationary appointment at the P-5, Step I level, as a Senior Political Affairs Officer in the Office of the Commissioner for Namibia (OCN), Department of Trusteeship and Non Self-Governing Territories. On 1 October 1972, he was granted a permanent appointment. On 1 October 1976, he was promoted to the D-1 level and on

1 January 1980, to the D-2 level. At the time of the events that gave rise to the present proceedings, the Applicant acted as Director of OCN. The Applicant was responsible in that capacity, for administering, in accordance with the U.N. Financial Rules and Regulations, the United Nations Fund for Namibia, a fund for the "provision of scholarships and of a comprehensive educational and training programme for Namibians with particular regard to their future administrative responsibilities in Namibia" (the Fund). The Applicant was one of two certifying officers for payment of scholarship and welfare funds to Namibian recipients.

In a memorandum dated 18 March 1982, the Director, Internal Audit Division (IAD), informed the Applicant that in conducting a preliminary audit of the administrative and financial aspects of OCN for the period 1980-1981, he had "identified serious deficiencies in internal control, including the lack of proper support documentation and no division of responsibilities in certain areas". In particular, he had noted that "substantial payments made during 1980-1981 for social and medical assistance" from the Fund "were not fully documented" and that consequently, he had been "unable to determine that the payments were made for the purposes intended and that the payees actually received the amounts disbursed". The Applicant was asked "to produce, as soon as possible, the appropriate evidence to justify and substantiate" payments made during the period under review to 35 individuals listed in an annex to the memorandum, "amounting to approximately US$200,000". In a reply dated 18 March 1982, the Applicant informed the Director, IAD, that he had sought the Controller's assistance "to establish proper guidelines and procedures", and that pending the establishment of such procedures, he was suspending all future payments to Namibians. In addition, he stated that the decision to provide assistance to the 35 Namibians listed in his memorandum had been taken "after careful consultation between [Mr. Ahtisaari] the [then] Commissioner for Namibia and the Rapporteur of the Fund for Namibia ...".

On 23 March 1982, the Applicant informed the Director, IAD, that he did not possess any written evidence concerning payments made to payees Nos. 1 through 22. He confirmed that those individuals had not submitted written requests for funds, asked for travel documents or requested return

tickets from the U.S.A. overseas. Some evidence was available for 13 others and he would provide it to the Director, IAD, before departing on a mission. He stated however, that all cases listed in annex A had been "considered and verbally approved" by the then Commissioner for Namibia. On the next day, the Applicant provided to the Director, IAD, the two addresses "known to [his] office" for the first 22 individuals. Upon the Organizations's later investigation none of those individuals was found to have been residing at those addresses. He asserted that he had reason to believe that those individuals had been "brought here [to the U.S.A.] and returned by the Democratic Turnhalle Alliance (DTA) [a Namibian group rival to SWAPO]." He also stated that "the practice of assisting needy Namibians and cashing their cheques was initiated as early as 1964 through arrangements made by [the] former Commissioner ... with the Chemical Branch Bank". This practice had been continued since. In this connection, the Applicant attached a copy of a letter dated 4 February 1981, in which he had allegedly sought the Bank's co-operation to cash cheques endorsed by payees and presented to the Bank by OCN. In response to a request by the Organization regarding this letter, an officer of the Bank, in a handwritten note at the bottom of the page, wrote: "To our knowledge we do not have this letter on file".

On 24 March 1982, the Secretary-General approved recommendations by the then Under-Secretary-General for Administration, Finance and Management, that the Applicant be instructed to defer his mission overseas and remain at Headquarters and that the Applicant be relieved of his duties as Certifying Officer.

On 26 March 1982, Mr. Ahtisaari, the former Commissioner for Namibia, advised the Director, IAD, that he had no recollection of discussing with the Applicant payments to the 22 Namibians and that although he did not generally review welfare payments, in accordance with U.N. Financial Rule 110.2(a), Certifying Officers were responsible for submitting the appropriate support documentation to the Controller before authorizing any payments.

On 29 March 1982, the Applicant reiterated to the Director, IAD, that "certification for payments for all assistance to Namibians in particular the cases in question, was carried out on the instructions of the Commissioner for Namibia".

On 30 March 1982, the Director, IAD, asked Mr. Ahtisaari, what was his "understanding of the procedures followed in the management of the welfare programme, in particular, the selection, approval and payment to the first 22 individuals" listed in an annex to the 18 March 1982 memorandum to the Applicant. In a reply dated 5 April 1982, the former Commissioner for Namibia stated that when he assumed his functions, the Applicant "was already responsible, as Director of the Office, for the activities of the Fund for Namibia". In the absence of "special provisions for the management and administration of the Fund" in General Assembly resolution 3296(XXIX), para. 1, the Fund was "administered in accordance with the normal financial regulations of the United Nations". He stated his surprise at the auditors' finding, that the Applicant had "authorized 'welfare payments', extending, in some cases, over several years, to some Namibians" which by "nature and size" would "put these payments into the financial category of scholarships". In addition, he noted that the Applicant, "as Director of the Office, was authorized to decide on individual cases, [and] like any other certifying officer, he was required to maintain proper documentation". He asserted that he had not instructed the Applicant to make payments to the 35 individuals listed by IAD, but noted that "as a senior United Nations official in whom, of course, [he] reposed the fullest confidence, [the Applicant] had full authority in regard to the scholarship programme and the making of any necessary social welfare payments."

In an interview conducted by the Director, IAD, and an Audit Officer, the Applicant admitted that he had personally picked up cheques for 22 Namibians at the Cashier's Office, that he had personally handed each cheque to each payee and that, although he sometimes counter-signed the cheques, he never endorsed them. Furthermore, he asserted that he did not personally witness the endorsement of the cheques. He alleged that, after picking up the cheques from the Cashier's Office, a representative of the payees would collect them from him, and would later return with them endorsed so that the Applicant could arrange for them to be cashed. On occasion, he obtained cash from the bank and handed it to the representative of the proper payees, who in turn, did not sign a receipt.

The Director, IAD, subsequently conducted interviews with Ms. M.L. Murphy, an Administrative Officer in OCN, Mrs. C. Gottesman, an Administrative Assistant and a secretary. Ms. Murphy stated that she had not "at any time seen or spoken to the individuals listed in Annex I of the 18 March 1982 memorandum ..." with the possible exception of one person who might be a student. She noted that the Applicant had directed that with respect to recipients being handled by him "no payment should be made while he was away" and that all papers relating to the payments were, in fact, kept solely by him because he said that they were "politically sensitive". Mrs. Gottesman indicated that she had no knowledge of the 22 Namibians, nor did she ever see or speak to them. A former secretary in OCN, stated that she never saw or spoke to the individuals, but informed the Applicant when the cheques were available at the Cashier's Office.

In the meantime, as part of the investigation, the Director, IAD, retained a handwriting expert to examine the endorsements on all cheques made out to the alleged Namibian recipients.

On 30 March 1982, the Secretary-General appointed a high level Commission of Inquiry (the Commission), composed of the Under-Secretary-General for Political Affairs, the Legal Counsel and the Assistant Secretary-General for Financial Services. The Commission was asked to investigate, "in order to ascertain the responsibility, if any, attaching to the officials involved", in view of the fact that some US$200,000 had been expended without support documentation and because the Applicant had stated that the payments in question "were considered and approved by Mr. Ahtisaari [the Special Representative of the Secretary-General for Namibia and former Commissioner for Namibia] - a statement which is disputed by Mr. Ahtisaari himself".

The Commission met seven times between 6 April and 26 May 1982 and interviewed relevant witnesses. The Commission concluded that on the basis of the extensive interviews conducted, the Applicant had "knowingly falsified the signature of recipients of cheques in an approximate amount of US$200,000 and knowingly misrepresented, to the Internal Audit Division and to the Commission, that he had not so falsified" and that he had "therefore, engaged in serious misconduct within the meaning of United Nations Staff Regulation 10.2 ...".

Although the Commission was "satisfied that Mr. Ahtisaari had no knowledge of the payments in question or that he had ever discussed or approved them ... as the Head of the Office, ... he must bear some measure of responsibility for the failure to exercise the necessary degree of supervision and oversight which might have prevented the commission of the irregularities". Although the Commission did not interview the approving officers, "inasmuch as there appeared to be no documentation supporting the obligation documents and requests for payment made by the certifying officer, the Commission feels that some measure of responsibility may attach also to the approving officers concerned". The Commission also considered a report dated 5 May 1982, from the handwriting expert in which he stated that "the 441 questioned endorsements contain significant identifying characteristics found in the standards. These findings lead to the conclusion that the Augustus F. Caine of the standards wrote the 441 endorsements".

On 28 May 1982, the Secretary-General accepted the conclusions of the Commission and decided that the Applicant be summarily dismissed, effective at the close of business on that day.

On the same date, the Assistant Secretary-General for Personnel Services informed the Applicant that the Secretary-General had decided to dismiss him with effect from 28 May 1982, under Staff Regulation 10.2, for serious misconduct and that this decision was based upon the report of the Commission. The Applicant was also advised that if he returned to the U.N. the full amount of the misappropriated funds, the U.N. would refrain from any further action against him.

On 4 June 1982, the Applicant wrote to the Secretary-General stating that he had not been given an opportunity to respond to the Commission's report and that he requested the Secretary-General to withdraw his decision until he had been given the opportunity to respond to the charges against him. He also requested the Secretary-General to submit his appeal in this case, the "second case" directly to the Administrative Tribunal.

On 4 June 1982, the Administrative Officer of OCN issued a P.35 form (Personnel Payroll Clearance Action Form) which was signed by the Director, OCN, attesting that the Applicant had separated from service on 28 May 1982. The form was also signed by a Personnel Officer at the Office of

Personnel Services. The Office of Financial Services declined to fill in Section III (the financial section) of the form, until the Applicant had made restitution of the allegedly misappropriated amounts.

On 11 June 1982, the Director, Division of Personnel Administration, transmitted to the Applicant a copy of the Commission's report and informed him that his request for direct submission of his appeal to the Tribunal would be considered in the light of the contents of his appeal to the Joint Appeals Board (JAB) "in order to determine whether the requirements for such exceptional agreement have been met". On 28 June 1982, the Applicant lodged an appeal to the JAB in the "second case".

On 14 July 1982, the Applicant informed the United Nations Joint Staff Pension Fund (UNJSPF) that he wished to either take, or consider taking, a withdrawal settlement and requested details of the amount of such benefit. On 28 July 1982, the Secretary of the UNJSPF informed the Applicant the amount of his deferred retirement benefit and that his withdrawal settlement amounted to US$70,760. On 5 August 1982, the Applicant informed the UNJSPF that he had elected to take a withdrawal settlement.

On 11 August 1982, the Secretary of the UNJSPF informed the Applicant that, before any action could be taken by his office to effect payment, his office was required to receive documentation from the Office of Financial Services, indicating that he had separated from service and reporting the corresponding pension contributions. On 15 October 1982, the Applicant wrote to the Secretary-General demanding, inter alia, release of the appropriate forms to the UNJSPF. Having received no reply, on 23 January 1983, the Applicant reiterated this request.

In a letter dated 28 February 1983, the Controller advised the Applicant that as it had been established that he had "knowingly falsified the signatures of recipients of cheques in an approximate amount of US$200,000", no action was intended to be taken in connexion with any pension entitlements he might have until he paid back to the U.N. the misappropriated funds. In a reply dated 18 March 1983, the Applicant stated that it was "very irregular to withhold payment of [his] pension and [he]

demand[ed] it". Similar requests were made by the Applicant on 22 June 1983 and 9 September 1983. On 28 September 1983, the Controller responded that the Organization was not in a position to accede to his request.

The Applicant did not raise the issue again until 3 April 1987, when he advised the UNJSPF that, as he had reached retirement age, he wished to be advised of the documents required to avail himself of his retirement benefits. He also stated that he rescinded his original decision to take a withdrawal settlement.

On 14 May 1987, the Secretary of the UNJSPF informed the Applicant that no payments could be made until the appropriate documents had been received from the United Nations.

On 19 May 1987, a prior counsel for the Applicant requested release of the P.35 form and reiterated those requests on 20 July and 1 October 1987. On 1 November 1987, the Applicant having received no reply to his communications, lodged an appeal with the Headquarters JAB in the "first case".

The JAB adopted its report on the "first case" on 26 August 1988. Its conclusions and recommendations read as follows:

> "Conclusions and Recommendations
>
> 25. The Panel concludes that the Organization erred in declining to transmit the appellant's P.35 form and separation notification to the UNJSPF after the appellant had been summarily dismissed from the Organization.
>
> 26. The Panel also concludes that effective the date of his summary dismissal, the appellant was no longer a staff member entitled to continued Pension Fund contributions by the Organization. He was, however, a former staff member, and as such, he was entitled to the release of his pension.
>
> 27. Accordingly, the Panel recommends that the Organization transmit to the UNJSPF the necessary documents to release the appellant's pension.
>
> 28. The Panel recommends further that the Organization compensate the appellant for the interest he would have earned at the prevailing United Nations Credit Union savings account rate during the period in question on the sum he

would have been entitled to withdraw from the UNJSPF in mid-1982 had the Organization fulfilled its obligation to transmit the appellant's separation forms to the UNJSPF.

29. The Panel makes no further recommendation in support of this appeal."

On 20 September 1988, the Officer-in-Charge of the Department of Administration and Management informed the Applicant that the Secretary-General had decided to accept the JAB recommendation to transmit the P.35 form to the UNJSPF but had decided not to accept the recommendation to pay interest since the Applicant had filed his "appeal against the contested decision only after four and a half years and therefore payment of interest is inappropriate under either the Staff Rules or the Financial Rules".

On 31 January 1989, the Applicant filed with the Tribunal the application referred to above in the "first case".

The JAB adopted its report on the "second case" on 9 August 1988. Its conclusion and recommendation read as follows:

"Conclusions and recommendation

85. Based upon the foregoing, the Panel concluded that the Secretary-General's findings were based upon correct and complete information, after a thorough audit and investigation which provided to the appellant all of the protections of due process.

86. The Panel concluded further that the Secretary-General did not err in his finding that the appellant's misconduct was patent and clearly incompatible with his continued service in the Organization.

87. Accordingly, the Panel makes no recommendation in support of the Appeal."

On 10 August 1988, the Officer-in-Charge of the Department of Administration and Management informed the Applicant that the Secretary-General had decided to maintain the contested decision in the light of the Board's report.

On 31 May 1989, the Applicant filed with the Tribunal the application referred to above in the "second case".

Whereas, in the "first case", the Applicant's principal contentions are:

1. The Respondent was legally required to submit the forms attesting to the Applicant's separation from service to the Pension Fund pursuant to the applicable Regulations and Rules.

2. The Applicant is entitled to receive interest on his withdrawal settlement.

3. The Applicant is entitled to damages for the material and moral injuries suffered by him as a direct consequence of the Respondent's arbitrary and capricious actions following his forced separation from the Organization.

4. The Applicant is entitled to appropriate and adequate compensation for unreasonable delays in the JAB procedures, constituting a "denial of justice".

5. The Applicant is entitled to compensation and emoluments because the Organization's records show that he continued in its employ after his purported dismissal.

Whereas, in the "second case", the Applicant's principal contentions are:

1. The Respondent violated the Applicant's fundamental right to due process of law, fair play and impartiality in the administration of justice.

2. The Respondent attempted in vain to prosecute the Applicant on alleged criminal charges.

3. The Respondent failed to review the Applicant's appeal to the JAB fairly, independently and impartially pursuant to the applicable Regulations and Rules.

4. The JAB failed to review the Applicant's appeal fairly, independently and impartially pursuant to the applicable Regulations and Rules.

5. The Respondent failed to establish that the Applicant had a patent intent to commit the alleged irregularities justifying his summary dismissal from the service of the Organization.

6. The Applicant is entitled to compensation for unreasonable delays in the JAB procedures, causing a "denial of justice".

Whereas, in the "first case", the Respondent's principal contentions are:

1. Failure by the Organization to issue a P.35 form, immediately upon, or shortly after, the summary dismissal of the Applicant in an attempt to recover misappropriated funds, does not entitle the Applicant to damages.

2. The Applicant's conduct bars any entitlement that may have existed to payment of interest on account of failure to promptly issue a P.35 form.

3. Retention of the Applicant's name in computerized payroll records subsequent to the date of his summary dismissal does not entitle the Applicant to pay and allowances for that period.

4. Award of profit costs should be limited to cases where an Applicant is represented by a person entitled to practice law for reward.

Whereas, in the "second case", the Respondent's principal contentions are:

1. The U.N. Charter and the Staff Regulations oblige the Secretary-General to select and retain staff of the highest standards of integrity and, therefore, he has the responsibility of determining definitively whether a staff member meets that standard.

2. The summary dismissal of the Applicant was preceded by ample opportunity for him to state his case and the actual decision was not improperly motivated.

The Tribunal, having deliberated from 27 April 1990 to 18 May 1990, now pronounces the following judgement:

I. Two appeals by the Applicant are before the Tribural. Case No. 511 involves the Applicant's summary dismissal for serious misconduct. Case No. 497 involves alleged wrong-doing by the Administration with respect to delaying access by the Applicant to his Pension Fund account following his termination. The two appeals are therefore related and the Respondent has

requested that they be joined and considered together by the Tribunal. The Tribunal considers joinder appropriate and will address both cases in this Judgement. The Tribunal deals first with case No. 511.

II. The Applicant in this case challenges the Secretary-General's decision dated 10 August 1988, maintaining his original decision of 28 May 1982, summarily dismissing the Applicant for serious misconduct. The basis for the decision was the Secretary-General's conclusion that the Applicant had misappropriated US$207,582 of the funds of the Organization during 1980 and 1981. This was said to have been accomplished by the Applicant obtaining from the Organization over 400 cheques payable to non-existent persons, whose names the Applicant falsely endorsed on the cheques. The Applicant then allegedly presented the cheques for and received payment; in some cases placing his own name on cheques as a second endorser. The Secretary-General's original determination of serious misconduct also said that the Applicant had falsely denied during investigation of the matter having forged any endorsement signatures on the cheques. In maintaining his original decision of 28 May 1982, the Secretary-General acted consistently with and evidently concurred in the conclusions reached by the Joint Appeals Board (JAB) which, as reflected by its report, carefully analyzed the documentary evidence, the testimony of witnesses and the arguments presented to it.

III. As is clear from the Tribunal's jurisprudence and in particular from its recent decisions in Judgement No. 429, Beyele (1988); Judgement No. 425, Bruzual (1988); Judgement No. 424, Ying (1988); and Judgement No. 445, Morales (1989), the Secretary-General has broad discretion to determine what constitutes serious misconduct and to summarily dismiss staff members who engage in it. Contrary to the Applicant's assertions, the Respondent is not required to establish beyond any reasonable doubt a patent intent to commit the alleged irregularities, or that the Applicant was solely responsible for them. The Tribunal's review of such cases is limited to determining whether the Secretary-General's action was vitiated by any prejudicial or extraneous factors, by significant procedural irregularity, or by a significant mistake

of fact. The Applicant maintains that prejudicial and extraneous factors motivated his dismissal, that he was also prejudiced by significant procedural irregularities and that there was a fundamental mistake of fact, namely, that, contrary to the Secretary-General's and the JAB's views, the Applicant had not misappropriated any of the Organization's funds. The Tribunal will examine each of these issues.

IV. The Tribunal turns first to the factual issues. The Applicant, who was Director of the Office of the Commissioner for Namibia (OCN) and who was entrusted with substantial authority and responsibility in that post, was, among other things, in charge of the distribution of scholarship assistance payments and social welfare payments to Namibians in the U.S. from U.N. funds specifically established for such purposes. Even before the tenure of the then incumbent Commissioner for Namibia during 1980 and 1981, the Applicant had similar responsibilities and authority with regard to such payments. Although numerous beneficiaries of such payments were dealt with by OCN and furnished proper documentation to OCN regarding their identity, addresses, activities and needs, the Applicant claims that during 1980 and 1981 and in prior years a number of Namibians who were entitled to payments from U.N. funds were handled by him secretly.

The Applicant says that this covert group of Namibians, consisting of some 35 individuals, were politically unpalatable to the South West Africa People's Organization (SWAPO) in Namibia and that it was essential that payments to them be cloaked in secrecy. This was allegedly to avoid repercussions from SWAPO and its supporters if it became known that these individuals were receiving payments from the U.N. The Applicant contends that all of the funds he is charged with misappropriating were secretly disbursed by him to these individuals and that this was done on the verbal instructions of the Commissioner in keeping with long-established practices.

The Tribunal notes that, on 19 March 1982, a few days before the Applicant gave this explanation, he had written to the Assistant Secretary-General, Office of Financial Services (OFS), referring to the serious deficiencies found by the auditors and stating "what is needed most urgently is some kind of financial control mechanism which would ensure at all times

that the financial rules and regulations are being followed". This statement is not at all consistent with the position taken later by the Applicant regarding the allegedly long authorized practice of secret payments which he claims he was following; nor could it be reconciled with the prior knowledge about and approval of the secret payments he later attempted to impute to the Assistant Secretary-General, OFS, regarding the approving officers or with his allegations regarding the conduct of the Assistant Secretary-General, OFS, himself.

V. The Applicant's conduct came to the attention of the Administration as a result of an audit conducted a short time prior to 18 March 1982 by the U.N. Internal Audit Division (IAD). The auditors confronted the Applicant with the substantial payments to numerous purported recipients which had occurred over the two-year period in question but for which the auditors were unable to find supporting documentation of the type required by the applicable Financial Regulations and Rules of the U.N. (see, generally, Rules 108 and 110) governing certifying officers, of which the Applicant was one. The auditors were also dissatisfied with the apparent absence of required internal controls and proper procedures in connection with these disbursements of U.N. funds. They asked the Applicant to furnish them with all documentation he had supporting the payments, but the Applicant had no files on any of the recipients and no documentation other than some miscellaneous obligation documents and his memoranda requesting payment which he used to obtain the cheques. The Applicant had obviously certified the requests for cheques on the basis of his alleged private knowledge of the existence of the beneficiaries and their entitlement to the funds. He alleged that this was done pursuant to verbal instructions he had received from the Commissioner. In answer to a question by the Tribunal, the Respondent informed it that the approving officers involved lent their authority to the issuance of the cheques in reliance on the Applicant's certification alone.

VI. The Applicant obtained the cheques himself and allegedly had them endorsed in his presence by the recipients or turned them over to a

representative of the recipients who took them to the recipients, had them endorsed and then returned them to the Applicant. The Applicant then cashed the cheques at the bank or allegedly assisted recipients or their representative in cashing them, sometimes signing his name as a second endorser. After he cashed cheques, he allegedly turned the cash over to the recipients or to their representative in his office. As much as US$4 000 was involved on such occasions. The Applicant never obtained signed receipts from any of the recipients or from their representative for the cash he allegedly gave them. Even if a confidential operation had been ongoing, there is no apparent reason why the Applicant could not or would not have kept detailed secret files on each of the cases, fully explaining and documenting each transaction, with the files kept secure in a locked file or safe.

VII. The auditors requested the Applicant to furnish evidence to confirm the existence of the recipients and their receipt of the funds. There was plainly no concealment from the Applicant of adequate notice. But nothing was forthcoming from the Applicant other than his own ipse dixit and his assertion that he had been authorized by the Commissioner. The Commissioner both verbally and in writing denied ever having authorized payments to any of the names in question and made it clear that he would not have considered any payment requests in the absence of appropriate documentation.

VIII. In essence, the Applicant's contentions as to the facts depend entirely on whether his statements are to be believed.

IX. Although the issuance of any further cheques to the 35 recipients was immediately stopped as a result of the audit investigation, no communication was ever received by the U.N. from any of the alleged recipients — either in person or in writing — complaining about discontinuance of payments, and none of the 35 recipients ever appeared. Despite intimations to the contrary by the Applicant, the Tribunal finds no evidence that the Applicant ever made any attempt to communicate with any of the alleged recipients in order that they might substantiate his claims.

X. At a later date, the Applicant contended that all of the alleged recipients had been spirited out of the country by an alleged agent of the South African Government, apparently because revelation of the payments to them would have caused a scandal or endangered them in some fashion had they remained in the country. The Tribunal finds that here again no evidence besides the Applicant's words was offered in support of these claims.

XI. The circumstances regarding the payments that were uncovered by IAD plainly established a prima facie case of irregularities of so serious a nature as to warrant summary dismissal by the Secretary-General if no satisfactory explanation was immediately forthcoming from the Applicant.

XII. It bears emphasis that, even though the Secretary-General could reasonably have considered the Applicant's explanations and lack of evidence as totally insufficient, the Secretary-General went beyond his obligation to afford the Applicant due process by designating an ad hoc Commission of Inquiry (the Commission) to investigate and report. The Tribunal does not find that this action divested the Secretary-General of his right under Staff Regulation 10.2 to dismiss the Applicant summarily for serious misconduct following the report of the Commission.

XIII. As a result of the Commission's inquiries, an outside handwriting expert, who had been retained earlier, completed preliminary work to determine whether the handwriting characteristics of the endorsements on the cheques indicated that they had been written by the same person and whether the Applicant might have been that person. The opinion of the handwriting expert was that the Applicant had forged the endorsements on over 400 of the cheques.

XIV. The Commission learned from other staff members in OCN that none had ever seen any of the alleged recipients or any documentation relating to them. It may be noted, in addition, that another certifying officer in OCN established that numerous recipients for whom payments were handled by her, and who were not affiliated with SWAPO, routinely furnished the information

and documentation required by OCN as a prerequisite to scholarship or social welfare benefit payments. Following the report of the Commission, which concluded that the alleged recipients were non-existent and that the Applicant had forged their signatures and misappropriated the funds, the Secretary-General, in his discretion, decided to dismiss the Applicant summarily for serious misconduct.

XV. On the record of this case, the Tribunal cannot conclude that the Secretary-General was acting on a mistake of fact in summarily dismissing the Applicant. Given the evidence, the Secretary-General was not obliged to believe the Applicant's assertions. Indeed, the discretionary authority of the Secretary-General would have permitted summary dismissal for serious misconduct solely on the basis of the repeated flagrant violations of U.N. financial regulations that were initially discovered by the auditors and which the Applicant admitted having committed, without having regard to whether there was proof that he had forged endorsements on the cheques. In the Tribunal's view, a staff member, particularly one occupying the position and the level of the Applicant, who engages in such conduct purportedly at the verbal direction of a superior without obtaining specific and unambiguous written instructions verifying his authority to do so, is per se guilty of serious misconduct if he is unable to establish promptly by clear and convincing evidence that the alleged payments were authorized, were actually made and were received by persons entitled to receive them.

XVI. The Applicant's claim that prejudicial or extraneous factors motivated his dismissal rests on his assertion that the then incumbent Commissioner mistakenly believed that the Applicant had helped defeat his candidacy for re-election. Apart from pure speculation and conjecture, the Applicant, almost entirely on the basis of his own self-serving assertions, asks the Tribunal to draw highly tenuous inferences in his favour. The Tribunal finds not the slightest evidentiary support for this claim of prejudicial or extraneous factors.

XVII. As to alleged procedural irregularities, the Applicant makes a number of contentions, none of which have merit or are supported by the evidence. The IAD plainly had authority under U.N. Financial Rules 110.41 and 106.4 to audit the expenditure of trust funds controlled by the U.N. There is no regulation or rule requiring the sort of advance authorization or subsequent report that the Applicant claims was called for. Nor for obvious reasons is there any requirement that IAD always notify its targets in advance.

XVIII. The Applicant argues that he was not accorded due process in connection with the audit and the ensuing investigation by the Commission. As indicated above, the evidence gathered by IAD was such that the Secretary-General could properly have summarily dismissed the Applicant without seeking the advice of a Commission, and none of the Applicant's due process contentions are meritorious, or justified by the evidence.

XIX. The Tribunal finds that the Applicant was accorded ample opportunity to understand the exact nature of the conduct that was being questioned and he had adequate opportunity to explain it both to IAD and to the Commission.

XX. The Applicant claims irregularities in the proceedings conducted by the JAB, some of which relate to the Respondent's alleged unwillingness or failure to make available to him information requested by his counsel (much of which the Tribunal finds irrelevant or immaterial). Here again the Applicant's contentions are without merit. The Tribunal finds that the JAB conducted its proceedings properly. With respect to the alleged irregularity in failing to make available to the Applicant the original cheques, the Tribunal finds that, under the circumstances, a reasonable explanation was advanced by the Respondent: the original cheques were in the possession of the New York District Attorney's Office in connection with a possible criminal proceeding against the Applicant. It would have been highly questionable for the Respondent to have allowed the original cheques to be removed from his possession or control, and the Respondent made photocopies of the cheques available to the Applicant.

XXI. Whether the Applicant's superior may have been technically responsible for inadequate supervision of the Applicant is of no consequence with regard to whether the Applicant was guilty of serious misconduct.

XXII. The Applicant has requested the Tribunal to make findings on a number of points despite the absence of evidence supporting the requests or the irrelevance of the requests. For example, the Applicant asks the Tribunal to find that IAD was not authorized to conduct the surprise audit referred to above without the knowledge of or prior consultation with the United Nations Council for Namibia. The Tribunal finds no evidence to support such a determination and considers that whether the United Nations Council for Namibia had knowledge of or was consulted prior to the audit is irrelevant and immaterial.

XXIII. The Applicant has also requested the Tribunal to find that the Respondent acted unlawfully in not reporting to the United Nations Council for Namibia or to any other organ of the U.N. on the findings, considerations and recommendations of IAD and the Commission with regard to the alleged secret social welfare payments by the Applicant. In the opinion of the Tribunal, there was no such obligation on the part of the Respondent.

XXIV. The Applicant also asks the Tribunal to determine that the Respondent arbitrarily and capriciously attempted to procure criminal prosecution of the Applicant. There is no evidence which would support any such determination. On the contrary, there was reasonable cause for the Respondent to have brought the matter to the attention of the appropriate authorities. The Tribunal therefore denies the request.

XXV. The Applicant asks the Tribunal to determine that the JAB wilfully and unreasonably delayed the Applicant's appeal for over six years. There is no evidence which would support any such determination and it is therefore denied. The Tribunal's review of the record establishes to its satisfaction that the JAB acted properly and took reasonable steps in an effort to expedite the appeal. However, the Applicant's assertion of undue

delay by the Respondent has merit. The Tribunal deplores the delay of two years by the Respondent in submitting to the JAB his answer to the appeal. In the circumstances of this case, the Tribunal is unable to find that the Applicant was materially injured by this delay. Accordingly, the Tribunal will award no damages with respect to it, but again urges that the Administration take appropriate measures to avoid such delay in the future.

XXVI. The Applicant has requested that the Tribunal hold oral proceedings in order to hear the Applicant and other witnesses. The Tribunal is satisfied that the record in this case is adequate to enable it to reach a decision and therefore denies the request.

XXVII. The Tribunal deals now with case No. 497. In this case, the Applicant appeals against a decision of the Secretary-General dated 20 September 1988, in which the Secretary-General accepted a JAB recommendation to transmit a P-35 form to the U.N. Joint Staff Pension Fund (UNJSPF) to enable the Applicant to receive his pension entitlement and also decided not to accept the JAB recommendation with regard to the payment of interest. In addition, the Applicant claims that the failure of the Respondent to transmit the form when this was first requested by the Applicant in 1982, was arbitrary and capricious entitling the Applicant to damages and that, by reason of the Applicant's continued appearance on the payroll records of the Organization, the Respondent was obliged to pay the Applicant his salary and allowances as well as make required contributions to the Pension Fund during the period subsequent to 28 May 1982. The Applicant also seeks legal costs of US$3,000 as well as travel and other expenses.

XXVIII. Soon after the Applicant's summary dismissal for serious misconduct on 28 May 1982, the Administration made clear to him that it expected him to reimburse the Organization for the funds he had misappropriated. This the Administration plainly had the right to do. Rule 114.1 of the Financial

Regulations and Rules of the U.N., which was as much a part of the Applicant's contract of employment as other Staff Regulations and Rules, provides:

> "Every official of the U.N. is responsible to the Secretary-General for the regularity of the actions taken by him or her in the course of his or her official duties. Any official who takes any action contrary to these Financial Rules, or to the Administrative Instructions issued in connection therewith, may be held personally responsible and financially liable for the consequences of such action." See, also, Staff Rule 112.3.

XXIX. The record shows that the Administration wanted the Applicant to agree to make reimbursement and hoped that funds credited to his pension account could be used for this purpose. Not long after the Applicant's dismissal, the Administration declined to complete the P-35 form, submission of which to the Pension Fund was one of the prerequisites to any payment by the Fund to the Applicant. The Administration's view was that, prior to completion of the P-35 form, the Applicant would have to arrange for restitution. This was communicated to the Applicant on 28 February 1983, following earlier unsuccessful attempts by him to obtain a withdrawal settlement of some US$70,000 from the Pension Fund.

XXX. Although the Applicant reiterated his objection to the withholding of his pension on a few occasions in 1983, he did not appeal the issue until over four years later in 1987. On 1 November 1987, the Applicant appealed to the JAB with regard to this matter, initially asking that his appeal be submitted directly to the Tribunal. However, after the Administration in March 1988 informed the JAB that the Secretary-General had determined that consideration by the JAB would be useful, the Applicant in May 1988, changed his earlier request and instead asked that the case be taken up by the JAB without delay. The JAB did so and adopted its report on 26 August 1988.

XXXI. In Judgement No. 358, Sherif (1985), the Tribunal was faced with a somewhat similar situation. However, in that case, the Organization had failed to complete and transmit to the Pension Fund a Separation

Notification form (PF/4) after having issued the P-35 form in accordance with ST/AI/155/Rev.1 of 3 July 1974, and notified Mr. Sherif of this. (See Sherif, page 7). The PF/4 form is a purely ministerial separation notice form, containing only separation date, dates of contributory service and contributions paid to the Pension Fund during the staff member's employment. In that case, the Tribunal noted that the Respondent could not justify his unwillingness to complete and transmit the form under any Staff Rule or Instruction.

XXXII. The Respondent contends that a different result should have been reached by the JAB in this case, arguing that the P-35 form stands on a significantly different footing, and that the purpose of the form is primarily to ensure that the financial affairs of the separated staff member vis-a-vis the Organization are in order. In the Applicant's case they were not, since he owed the Organization US$207,582. However, the JAB concluded that the Administration had acted improperly in refusing to transmit the form to the Pension Fund promptly even if it was unable to complete a section of the form relating to financial clearance.

XXXIII. Since the Respondent decided to accept the JAB recommendation to transmit the P-35 form, it is unnecessary for the Tribunal in this case to express an opinion with regard to the JAB's legal analysis of ST/AI/155.

XXXIV. The Tribunal recalls its Judgement No. 358, Sherif (1985) in which it stated in para. XII:

> "The Tribunal notes with regret that neither the Staff Rules nor the Regulations and Rules of the Pension Fund provide for measures enabling the Administration to withhold or deduct amounts owed by a staff member other than from salaries, wages and other emoluments."

XXXV. The Tribunal notes that no action appears to have been taken by the Respondent with respect to these recommendations. The Tribunal reiterates that it is undesirable to leave in doubt the relationship between the

Organization's duty to inform the UNJSPF of a staff member's separation from service, and the staff member's duty to make restitution to the Organization when a debt is owing.

XXXVI. In the circumstances of this case, the Tribunal finds that the course followed by the Respondent was by no means arbitrary or unreasonable. Accordingly, the Tribunal sees no justification for any award of damages to the Applicant for the delay in the release of his pension entitlements. Moreover, the Tribunal notes that more than four years elapsed between the time that the Applicant was made aware of the Administration's position and the date of his appeal to the JAB. Given this lapse by the Applicant, there is likewise no justification for any award of compensation to him with respect to that period, particularly in view of the nature of the serious misconduct for which he was summarily dismissed. Finally, the Tribunal does not consider unreasonable the period between the date of the JAB report, the Secretary-General's decision to accept it in part, and the date of its implementation. Hence, no interest will be awarded to the Applicant with respect to that period.

XXXVII. With respect to the Applicant's claim relating to retention of his name in the Organization's payroll records after his summary dismissal, the Tribunal is entirely in accord with the conclusions reached by the JAB on this issue for the reasons stated by it. The Applicant's status as a person summarily dismissed for serious misconduct was not affected by the presence of his name in the memory banks of the Organization's computer. Accordingly, this claim being utterly without merit, it is denied by the Tribunal and the Tribunal finds it unnecessary to consider the question of whether the claim would be time-barred on account of Staff Rule 103.15 as the Respondent argues.

XXXVIII. The Applicant has asserted that the Administration has failed to make clear the amount he allegedly misappropriated, and the number of fictitious recipients. This assertion is not borne out by the evidence, which shows the number to have been 35 and the amount to be US$207,582, and

the Tribunal finds that as of the date of the Applicant's separation from the U.N. he was indebted to the Organization in that amount.

XXXIX. In view of the foregoing, the Tribunal:

1. Rejects the applications in cases Nos. 511 and 497 in their entirety;

2. Denies the request for counsel fees and expenses.

(Signatures)

Roger PINTO
President

Jerome ACKERMAN
Vice-President

Francisco A. FORTEZA
Member

Geneva, 18 May 1990

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/480
22 May 1990

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 480

Case No. 505: LOPEZ

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Roger Pinto, President; Mr. Ahmed Osman, Vice-President; Mr. Francisco A. Forteza;

Whereas, at the request of Laura Lopez, a former staff member specially recruited for the United Nations Children's Fund, hereinafter referred to as UNICEF, the President of the Tribunal, with the agreement of the Respondent, successively extended to 30 November 1988, 31 January, 28 February and 31 March 1989, the time-limit for the filing of an application to the Tribunal;

Whereas, on 31 March 1989, the Applicant filed an application, the pleas of which read in part as follows:

"II. PLEAS

7. The Applicant respectfully requests the Administrative Tribunal:

A. Preliminary Measures

(1) To direct the Respondent, pursuant to Article 10 of the Rules of the Tribunal, to:
(a) furnish the Applicant with certified true copies of the Minutes of the UNICEF Appointment and Placement Committee, indicating the specific reasons for rejecting every one of the seventeen applications

submitted by the Applicant for suitable vacant posts in UNICEF during the period 1981 to 1988, as listed in ... . (...); and

(b) furnish the Applicant with certified copies of the relevant reports of the External Auditors, criticizing UNICEF for maintaining the Applicant's services on a continuing basis under Consultancy Contracts, Special Service Agreements for Consultants, and Short-Term Contracts ...

B. Substantive Measures

...

(10) To order the Secretary-General:

(a) To rescind his decision of 1 June 1988 to maintain the contested decision taken by UNICEF not to award the Applicant [an] appropriate contract for her continuing service beyond 31 December 1986.

(b) To reinstate the Applicant in UNICEF, retroactive from 1 January 1987.

(c) To pay the Applicant her salary and allowances (less the hourly wages paid to her during 1987), as well as appropriate contributions on her behalf and on behalf of the UNICEF to the Pension Fund, retroactive from 1 January 1987 until the implementation of the judgement on this case.

(11) To award the Applicant appropriate and adequate compensation for considerable financial loss and severe moral injuries suffered by her as a direct consequence of the aforesaid arbitrary, capricious, discriminatory and prejudicial decisions taken by UNICEF and by the Respondent, causing thereby a 'miscarriage of justice'.

(12) To hold oral proceedings in order to hear the testimony of the Applicant and of the witnesses concerned."

Whereas, on 21 July 1989, the Applicant informed the Executive Secretary of the Tribunal that she was amending her pleas in part as follows:

"(12) To hold oral proceedings in order to hear the testimony of the Applicant and of the witnesses concerned, particularly the following:

...

(13) To award the Applicant as legal costs a sum of $3,000.00."

Whereas the Respondent filed his answer on 29 November 1989;

Whereas the Applicant filed written observations on 31 January 1990;

Whereas, on 19 March 1990, the President of the Tribunal ruled that no oral proceedings would be held in the case;

Whereas, on 27 April 1990, the Tribunal put questions to the Respondent and on 3 May 1990, he provided answers thereto;

Whereas, on 14 May 1990, the Applicant submitted comments on the answer provided by the Respondent;

Whereas the facts in the case are as follows:

The Applicant was recruited by UNICEF on 3 January 1978, as Personal Assistant to the Special Representative for the International Year of the Child. She was initially offered a two year and twenty-nine day fixed-term appointment at the P-3 level, "limited to service with the International Year of the Child Secretariat". This appointment was extended first, for a further fixed-term period until 30 June 1980 and then, until 30 September 1980, as an External Relations Officer at the Office of the UNICEF Executive Board and Liaison with Non-Governmental Organizations.

The Applicant was subsequently employed by UNICEF as a consultant. She was offered a series of special service agreements, with intermittent, short breaks in service between them, commencing on 29 October 1980 and ending on 31 December 1985. Her assignments were related to the International Year of the Child, the Kampuchea emergency operation and a History Project, all specific UNICEF projects.

According to the record of the case, during the course of her employment on special service agreements, an extensive exchange of correspondence ensued between the Administration, the Applicant and lastly, the Applicant's father, then Permanent Representative of the Philippines to the United Nations and the Executive Director of UNICEF, concerning the modalities of the Applicant's employment, her career prospects with UNICEF and the Applicant's activities in the Staff Union. The Applicant was anxious to regularize her contractual situation and to obtain an appointment as a staff member. In a note for the file dated 4 February 1983, a Policy Officer at the Division of Personnel (DOP) acknowledged that "by keeping

Ms. Lopez-Lising on SSAs [Special Service Agreements] for more than two years, we are breaching the requirements of A.I.[Administrative Instruction] 318, which sets 126 working days in any period of 12 months as the normal duration for which a consultant may be employed". In a memorandum dated 4 February 1983, the Deputy Executive Director discussed the Applicant's career prospects with UNICEF. She pointed out that although the Applicant had "performed a very useful role in a number of capacities ... these [had] been of a temporary and short-term nature". The Administration had given "careful consideration" to the Applicant's suggestion that a post be created as Reports Officer but "regrettably this suggestion ... [was] not possible in the current budgetary climate". She also noted that she understood the Applicant had been offered "employment of a more permanent nature in terms of a field assignment, but that this did not accord with [the Applicant's] personal preferences".

In February 1984, when the Project Officer for the History Project, who was the Applicant's supervisor, requested an extension of the Applicant's special service agreement, the then Director, DOP, informed her that UNICEF could not "continue [granting the Applicant] SSA's forever" and that the Applicant should submit her candidacy for available vacant posts. On 1 March 1984, the Applicant wrote to the Director, DOP, concerning his statement and listed all the jobs for which she had applied for from August 1981 to March 1983.

On 20 March 1984, the Acting Chief, Recruitment and Placement, informed the Applicant that a new consultancy contract would be issued through 31 March 1984, but that from thereon, UNICEF would "not be in a position to consider further extensions ..." since UNICEF was, "in this regard, trying to keep to the administrative policy on Special Service Agreements". In addition, he noted that in the past year the Applicant had "not applied for any of the advertised positions". The Applicant's consultancy contracts were however extended until 31 December 1985.

On 18 December 1985, the Director, DOP, informed the History Project that he would not process the Department's request for an extension of the Applicant's services for a further month, since UNICEF had "received critical observations by the External Auditors regarding the ... consultants

who worked for the History Project in 1985 ..." and UNICEF had "made a commitment and promise to the External Auditors that [they] would observe UNICEF's regulation and the U.N. rule regarding use of consultants ...".

The Applicant was subsequently employed on two short-term appointments under the 300 Series of the Staff Regulations and Rules to work on the History Project. The first appointment was for a period of six months, commencing on 1 February 1986 and ending on 31 July 1986, the second was for a period of four months, commencing on 1 September 1986 and ending on 31 December 1986. The last appointment was not extended and the Applicant separated from the service of UNICEF on 31 December 1986.

According to the record of the case, the Applicant was subsequently hired as a consultant, from 15 March 1987 through 31 December 1987, at the wage rate of US$14 per hour, to work in classifying and archiving historical materials for the UNICEF History Project. Funds for this contract were obtained from the Mutual Assistance Fund of the Standing Group of the National Committees for UNICEF ("Mutual Assistance Fund"), a group of non-governmental organizations whose objective is to raise funds for UNICEF.

In a letter dated 30 April 1987, the Applicant requested the Secretary-General, in accordance with Staff Rule 111.2(a), to conduct administrative review "of the change in [her] status from short-term staff member under the 300 Series to employee remunerated by UNICEF through the Mutual Assistance Fund". She also requested the Secretary-General to review UNICEF's denial of an extension of her "staff member appointment" which had expired at the end of December 1986. She asked that steps be taken to "regularize" her prior employment (for approximately eight years, both as a staff member and as a consultant/independent contractor) with UNICEF.

On 13 July 1987, the Acting Executive Director of UNICEF informed the Applicant that her request for administrative review of a decision taken on 31 December 1986, was time-barred under Staff Rule 111.2(a). He also stated that the Applicant's employment prospects with UNICEF had always been made clear to her. Although UNICEF had no obligation to employ the Applicant following expiration of her fixed-term appointment with the International Year of the Child Secretariat, UNICEF had hired her as a consultant, which had been to the Applicant's benefit.

On 15 September 1987, the Applicant lodged an appeal with the Joint Appeals Board. The Board adopted its report on 26 May 1988. Its conclusions and recommendation read as follows:

"Conclusions and Recommendation

40. The Panel decides to waive the time-limits for the filing of an appeal in the present case.

41. The Panel concludes that the decision not to renew the appellant's contract was not in breach of established jurisprudence of the United Nations Tribunal in that the appellant could not have had a reasonable expectancy of continued employment.

42. The Panel also concludes that, although the succession of SSAs approved by the UNICEF administration was irregular, it did not constitute unfair treatment of the appellant.

43. The Panel trusts that UNICEF view any subsequent application for employment in the context of the considerations outlined in the previous section.

44. The Panel makes no further recommendation in support of the appeal."

On 1 June 1988, the Under-Secretary-General for Administration and Management informed the Applicant that the Secretary-General, having re-examined her case in the light of the Board's report, had decided to maintain the contested decision and to take no further action on her case. The Applicant was also informed that should she wish to apply for a suitable post, her application would be fairly and objectively considered within the established procedures.

On 31 March 1989, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. UNICEF's unfair and discriminatory practice of awarding Consultancy Contracts, SSAs and Hourly Wage Contracts for performing the substantive functions of a regular staff member was abusive and contravened United Nations and UNICEF's Administrative Instructions governing the employment of consultants.

2. UNICEF's decision not to award the Applicant a permanent appointment and to reject every one of her applications for suitable vacant posts in UNICEF was arbitrary and vitiated by caprice, discrimination and prejudice.

3. The Applicant suffered injury because of UNICEF's discriminatory employment practices against women under consultancy or short-term contracts and her staff association activities.

4. The Applicant had a legal expectancy of continuing employment in UNICEF, after a distinguished service for a total of ten years and a presumptive right to consideration for posts elsewhere in UNICEF.

5. The JAB's failure to review the Applicant's appeal fairly, independently and impartially caused her a "miscarriage of justice".

Whereas the Respondent's principal contentions are:

1. The Applicant's legal status is governed exclusively by the terms of her employment contracts; her SSAs provided that during the period of her employment under those contracts, the Applicant had the legal status of an independent contractor and not that of a staff member, while her appointments as a staff member carried no expectancy of renewal.

2. The Applicant's claim to all allowances, grants and payments she would have received but for the Respondent having (in the Applicant's submission, wrongfully) denied her the legal status of a staff member during her independent contractor employment, is time-barred under Staff Rule 103.15.

3. The Applicant has not discharged the burden borne by her to prove that UNICEF's decision with respect to the renewal of her appointment as a staff member and "denial" of a career appointment was vitiated by prejudice, arbitrariness or discrimination.

The Tribunal, having deliberated from 1 May 1990 to 22 May 1990, now pronounces the following judgement:

I. The Applicant was employed as a UNICEF staff member from 3 January 1978 to 30 September 1980, from 1 February to 31 July 1986, and from

1 September to 31 December 1986. The question presented to the Tribunal is whether the Applicant was wrongfully denied a continuation of her employment as a UNICEF staff member at the expiration of these appointments and between them. She performed, between those appointments and thereafter, services to UNICEF in the capacity of a consultant, without the advantages she would have had as a staff member - e.g. annual leave, Pension Fund participation and medical insurance. The Applicant claims she should be reinstated as a staff member from 1 January 1987 and that the period of service covered by consultancy and similar agreements be deemed to have been performed by a staff member. The Respondent contends that the Applicant had no expectancy of an extension of her contract of employment as a staff member when her short-term appointment expired on 31 December 1986. The Respondent further contends that her interim employment from 29 October 1980 to 31 December 1985, as a consultant, under special service and similar agreements, with short, intermittent breaks between them, was justified by the nature of her functions which were substantially different from those of a staff member and were performed for separate, temporary projects of UNICEF.

II. The Tribunal must resolve these issues in the light of its previous findings on the relationship between periods of service performed as a staff member and periods of service performed under special service agreements. (Cf. Judgement No. 423, Isaacs (1988), Judgement No. 281, Hernández de Vittorioso (1982) and Judgement No. 233, Teixeira (1978)). In those Judgements, the Tribunal established that a staff member who, on the expiration of his or her contract of employment, continues to perform the same functions but is denied the status of a staff member and is given special service agreements instead, has the right to have the original status continued for the duration of those agreements.

The Tribunal also stated that:

> "... long-term and repeated use of the special service agreement may produce unintended consequences where work performed is full-time, continuous and in other important respects indistinguishable from the work of individuals in the same office who have the status of staff member". (Judgement No. 281, Hernández de Vittorioso, para. II)

In Judgement No. 423, Isaacs, para. X, the Tribunal added that:

"These considerations apply a fortiori when the continuous service of a staff member which entails participation in the Fund, is broken by a special service agreement."

III. The Tribunal must analyse the situation in the present case in this context. When the Applicant was originally employed as a staff member on a two year and 29 day fixed-term appointment from 3 January 1978 to 31 January 1980, it was stated in her letter of appointment that her employment was "limited to service with the International Year of the Child Secretariat", i.e. for a specific purpose, in connection with a particular project. When this appointment was extended for two further fixed-term periods until 30 September 1980, it was still for the same purpose and still "limited to service with the International Year of the Child Secretariat". Thereafter, the Applicant was employed on a series of special service agreements, to perform further duties, still connected with the International Year of the Child. These special service agreements ran from 29 October 1980 until 31 March 1981.

The subsequent special service and other similar agreements from 6 April 1981 to 31 December 1985, with short intermittent breaks between them, and her later appointments as a staff member on short-term contracts from 1 February to 31 July 1986 and from 1 September to 31 December 1986, were for purposes no longer connected to the International Year of the Child, but to special projects such as the Kampuchea Operation and the History Project. These appointments covered a period of almost five years.

IV. In order to determine whether the functions performed by the Applicant were functions identical with, or similar to those performed by staff members, the Tribunal requested the Respondent to describe the Applicant's functions when she was employed under special service agreements. In his reply to the questions put by the Tribunal, the Respondent stated that: "... the work [the] Applicant performed during her consultancies was of a temporary, specific nature, related to the temporary projects ... [(a) the finalization of the International Year of the Child

report; the Kampuchea emergency operations; (c) the newly created History Project which was a specific organizational activity intended to record UNICEF's 40-year history] and for which the necessary expertise was not readily available within UNICEF".

V. In the light of the views expressed by the Tribunal on the appropriateness of using special service agreements, it would seem that the period immediately following the expiration of the Applicant's original contract of employment, namely from 29 October 1980 until 31 March 1981, was in essence an extension of the original appointment. The Applicant continued to perform the same functions but was denied the status of a staff member and was given special service agreements instead. However, it is clear that the various subsequent functions performed by the Applicant, not related to her original employment for the International Year of the Child, cannot be considered extensions of the original appointment.

VI. The Tribunal finds that in this case, the tasks performed by the Applicant after completion of the International Year of the Child Project, were of an ad hoc and temporary nature; namely for the Kampuchea Operation and the History Project. The Respondent may very well have been justified in employing the Applicant under special service agreements, if the alternative was that the Applicant would have had no employment at all. Unlike in Isaacs, it cannot be considered that these agreements were a substitute for an appointment as a staff member, or an extension of her original appointment.

VII. In the Tribunal's view, in accordance with its jurisprudence, no legal expectancy of further employment could have arisen at the expiration of the special service agreements, nor after the addition of another period of service performed under a short-term contract as a staff member.

VIII. The Tribunal notes that during the course of her employment, the Applicant applied for a series of posts, but was unsuccessful in obtaining permanent employment. The Respondent, in order to accommodate her, extended

the Applicant's consultancies, but informed her on a number of occasions, that he was not in a position to consider further extensions of the consultancies because he was acting against his own directives concerning long-term employment on special service agreements. The Tribunal considers that this practice, although favourable to the Applicant in this case, since it enabled her to continue rendering services and receiving remuneration, should not be resorted to by the Administration.

IX. In the light of the above, the Tribunal is satisfied that on the facts of this case, the Applicant did not have a legal expectancy of continued employment as a staff member, neither at the expiration of her fixed-term appointment on 30 September 1980, nor at the expiration of her short-term appointments on 31 July and 31 December 1986.

It finds, however, that the period of service following the expiration of the Applicant's fixed-term appointment on 30 September 1980, for the International Year of the Child, was in essence an extension of her original appointment and was improperly treated by the Respondent as not being a period of service performed by a staff member. Accordingly, the Tribunal orders the Respondent to pay the Applicant the difference between what the Applicant would have earned had she been employed as a staff member at the P-3, step III level (the grade and level at her separation from service), and what she earned as a consultant from 29 October to 31 December 1980 and 1 January until 31 March 1981.

X. For the foregoing reasons, the Tribunal orders the Respondent to pay to the Applicant:

1. A sum equal to the difference between what the Applicant would have earned had she been employed as a staff member at the P-3, step III level, and what she earned as a consultant from 29 October to 31 December 1980 and from 1 January until 31 March 1981.

2. Interest of 10 per cent a year, as of 31 March 1989, the date of the filing of the application, until the date of payment of the sum due to the Applicant under 1 above.

XI. All other pleas of the Applicant are rejected, including her requests for production of documents and testimony and her request for costs.

(Signatures)

Roger PINTO
President

Ahmed OSMAN
Vice-President

Francisco A. FORTEZA
Member

Geneva, 22 May 1990

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/481
23 May 1990

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 481

Case No. 508: EL SHAMI

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Ahmed Osman, Vice-President, presiding; Mr. Arnold Kean; Mr. Francisco A. Forteza;

Whereas, at the request of Taisseer Mansour Mahmoud El Shami, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended until 16 March and 16 April 1989, the time-limit for the filing of an application to the Tribunal;

Whereas, on 14 April 1989, the Applicant filed an application, the pleas of which read as follows:

"II-PLEAS

A - Applicant requests the Tribunal to order the Respondent to produce:

(1) All documents containing rules, guidelines or any other system used for determination of entry level of translators for appointment on a temporary or permanent basis, together with any amendments or alterations thereof.

(2) Text of the 1980 advertisement inviting candidates to sit for the Arabic translators examination.

(3) The complete results of the competitive examinations for Arabic translators held in 1980 and 1984.

(4) Copies of qualifications and experience sections of Personal History Forms (P-11) and the letters of appointment for the Applicant and his collaterals mentioned in tables 1 and 2 of section III-A of the present application, namely:

...

(5) All staffing tables of Arabic Translation Service since 1983.

(6) Performance evaluation reports of ... and ...

(7) Any other documents in his possession relating to this case as the proceedings may require.

For this purpose the Applicant waives his right of access to those documents, or parts thereof, which the Tribunal, in its wisdom and discretion, consider to be confidential. Should the Respondent refuse or fail to produce these documents, the Tribunal should draw from such refusal or failure the appropriate inferences against the Respondent.

(8) The Applicant makes no request at this time for hearing of witnesses but reserves his right to do so at a later date.

B - Applicant requests the Tribunal to:

1. Rescind the decision of the Secretary-General of 16 November 1988;

2. Adjudge that each and every fixed-term appointment of the Applicant is a new appointment and is neither a renewal nor an extension of any fixed-term appointment preceding it;

3. Adjudge that the Applicant's status throughout his service with the United Nations is not one of secondment and that any actions by the Respondent, directly or indirectly involving a third party, are extraneous to the relevant letters of appointment;

4. Adjudge that the special condition '(You) are on secondment from Government of the Arab Republic of Egypt' introduced by the Respondent in the Applicant's letters of appointment concluded after 27 March 1987, the date on which the Applicant filed his appeal on this matter with JAB [Joint Appeals Board], are null and void;

5. Adjudge correction of entry level with all related salaries and benefits including within-grade salary increments for letters of appointment starting

(A) 11 December 1985 (...)
(B) 11 December 1987 (...)
(C) 11 December 1988 (...)
(D) 11 February 1989 (...)
(E) 11 April 1989 (...)
(F) 11 December 1983 (...)

with effect from the date of starting work in each case.

6. Order payment of compensation in an amount equivalent to the difference between the sums of salaries and benefits the Applicant would have earned if he had been appointed at the correct level and the sums he actually received in each case as given in (5);

7. Order the contract relating to service starting 11 December 1983 changed from 'fixed-term' to 'probationary' with effect from 11 December 1983 and appropriate correction of all subsequent contracts;

8. Order the payment of reasonable compensation under article 9, paragraph 1, of its Statute, should the Secretary-General decide, within thirty days, that the Applicant shall be compensated without further action being taken in his case, and any additional compensation it may deem appropriate."

Whereas, the Respondent filed his answer on 5 July 1989;

Whereas, on 5 August 1989, the Applicant filed written observations in which he amended his pleas as follows:

"II. 'PLEAS'

The Applicant requests the inclusion of the following request as plea No 9 after plea No 8 in section A of Part II-PLEAS of his original application.

9. Hear, as witnesses, Mr. ..., Acting Chief, Arabic Translation Service, UN, New York, and/or Mr. ... of the same Service to verify that:

1. The Applicant had never worked as a trainee in the Arabic Translation Service.

2. The Applicant's duties and the work he actually performed during the period he served at P-2 level were not different in any way from those of his collaterals initially appointed at P-3, such as those mentioned in tables 1 and 2 of part III of the application, or from those of the Applicant himself after he was promoted to P-3 level.

3. The Applicant had worked as fully qualified translator from the first day he joined the Organization."

Whereas, on 27 March 1990, the presiding member of the Panel ruled that no oral proceedings would be held in the case;

Whereas, on 19 April 1990, the Applicant submitted further observations on the Respondent's answer;

Whereas, on 27 April 1990, the Tribunal put questions to the Respondent and on 3 May 1990, he provided answers thereto;

Whereas, on 2 May 1990, the Tribunal put questions to the Applicant and on 4 May 1990, he provided answers thereto;

Whereas the facts in the case are as follows:

Taisseer El Shami, an Egyptian national who successfully passed a U.N. competitive examination for Arabic translators held in 1980, entered the service of the United Nations on 11 December 1983. He was offered a two year fixed-term appointment as an Associate Translator at the P-2, Step I level in the Translation Division, Arabic Service of the Department of Conference Services. At the Applicant's request, on 7 February 1984, his entry level was corrected from the P-2, Step I level to the P-2, Step IV level, with retroactive effect to 11 December 1983 and he was offered a new letter of appointment, showing the correction. This administrative action was taken in recognition of the Applicant's work as a translator for the United Nations Industrial Development Organization (UNIDO), and his translation work while Vice-Dean of Tanta University in Egypt. Neither of the original letters of appointment stated that the Applicant was seconded from the Government of the Arab Republic of Egypt.

During 1985, the then Office of Personnel Services issued revised guidelines to determine grade levels of staff upon initial recruitment.

Guidelines applicable to language staff recruited by competitive examination were issued on 8 August 1985. According to those guidelines, six years of relevant experience in the field were required for recruitment at the P-3, Step I level, by successful candidates, holders of an M.A. level degree.

On 29 July 1985, the Administration asked the Government of the Arab Republic of Egypt for its consent to the extension of the Applicant's secondment to the United Nations, for a further fixed-term period of two years. The Government consented on 9 December 1985. The Applicant's appointment was thus extended for a further fixed-term period of two years. According to the Applicant, when he was offered this letter of appointment, he informed the Personnel Officer that he would not sign it because it contained the "special condition" that he was seconded from the Government of the Arab Republic of Egypt. Subsequently, the condition was deleted, and the Applicant signed the letter of appointment. Effective 1 December 1985, he was promoted to the P-3, Step I level as a Translator pursuant to Personnel Directive PD/9/59.

On 10 December 1986, the Applicant requested review of his entry level as stated in his letter of appointment, on the ground that he had been recruited in less favourable conditions than other Arabic translators who had joined the U.N. after him. The Applicant argued essentially that standards for determining entry levels of staff appointed after the 1984 competitive examination were clearly different from those used for staff appointed after the 1980 competitive examination. On 15 December 1986, the Applicant's request was denied. On 29 January 1987, the Applicant requested review of the decision to deny him a correction of his entry level. He argued that the renewal of his fixed-term appointment constituted a new offer of employment and consequently a new entry on duty. The Applicant did not request review of a decision concerning the offer to him of a probationary appointment. On 27 March 1987, the Applicant lodged an appeal with the Joint Appeals Board (JAB), against the decision to deny him correction of his entry level and requesting a change in his first appointment (entry on duty 11 December 1983) from fixed-term to probationary.

The Applicant's appointment was extended for a further fixed-term period of one year effective 11 December 1987. In this letter of

appointment was stated, for the first time, as a special condition, that the Applicant was seconded from the Government of the Arab Republic of Egypt. The Applicant asserts that "this was done without consultation with, or the consent of the Applicant and at a time when the Applicant and the Respondent were in contention about secondment".

In a cable dated 21 July 1988, the President of Tanta University informed the Applicant that his leave of absence from the University ended on 18 July 1988 and that if he did not return to his job within the time-limits set forth by law, his employment with the University would be terminated as of 19 July 1988. The Applicant did not return to his post at the University.

The Board adopted its report on 9 November 1988. The conclusions and recommendation by the majority of the Board read as follows:

> "Conclusions and recommendation
>
> 36. The majority of the Panel concludes that the appellant was on secondment from his government service at the time of his initial appointment and subsequent extensions thereof, and remained on secondment until 19 July 1988 when his employment relationship with his government was severed. Accordingly, the majority concludes that the appellant's recruitment on a fixed-term rather than a probationary appointment was appropriate.
>
> 37. The majority of the Panel, however, feels that since the appellant's employment relationship with his government has terminated, he should be awarded a probationary appointment. Accordingly, the majority recommends that the Administration take immediate action to convert the appellant's fixed-term appointment to a probationary appointment, and that the appellant be credited with the maximum number of months permissible towards the fulfilment of the probationary period.
>
> 38. The Panel concludes further that the established procedures and guidelines were applied in determining the appellant's entry level.
>
> 39. Accordingly, the majority of the Panel makes no further recommendation in support of the appeal."

In a dissenting opinion, a member of the Board recommended that:

"Recommendation

13. The nature of the appointment should be amended to probationary, with the effective date of 11 December 1983."

On 16 November 1988, the Under-Secretary-General for Administration and Management informed the Applicant that the Secretary-General, having re-examined his case in the light of the Board's report, had decided:

> "... to maintain the contested decision concerning the correction of [his] entry level from P-2, Step I, to P-2, Step IV, retroactive to the date of [his] official entry on duty, 11 December 1983, in accordance with the then relevant procedures and guidelines, and to take no further action with regard to the level of [his] subsequent appointments."

and

> ... that subject to official confirmation by the proper authorities concerning the termination of [his] secondment from his] Government and of [his] employment with Tanta University, Egypt, as of 19 July 1988, [his] case be referred to the appropriate appointment and promotion bodies for early consideration of conversion of [his] fixed-term appointment to a probationary appointment in accordance with staff rule 104.12 and the relevant procedures and guidelines. In this connection, it should be noted that it is within the discretionary authority of the Secretary-General under the Charter and the Staff Regulations and Staff Rules to determine the type and duration of a staff member's appointment in the interest of the Organization."

On 14 April 1989, the Applicant filed the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant had an acquired right, derived from service performed at UNIDO, to be initially recruited at the P-3 level.

2. The Applicant's status throughout his service in the U.N. has not been one of secondment. The special condition introduced by the Respondent in letters of appointment offered after 27 March 1987, is null and void.

3. Each and every one of the Applicant's fixed-term appointments constitutes a new appointment.

4. The Applicant was entitled to a probationary appointment effective 11 December 1983, under the applicable Staff Regulations and Rules.

Whereas the Respondent's principal contentions are:

1. The entry level of the Applicant's appointment was properly determined in accordance with the established procedures and guidelines.

2. The granting to the Applicant of a fixed-term as opposed to a probationary appointment did not violate his rights.

The Tribunal, having deliberated from 2 May to 23 May 1990, now pronounces the following judgement:

I. The Applicant has requested an oral proceeding to examine a number of witnesses and he has also requested the production of documents. The Tribunal considers that the documentation in the case is sufficiently complete and therefore rejects the Applicant's requests in this regard.

II. The Applicant, in his pleas, raises two central issues. The first relates to the correction of his entry level when he was first appointed on 11 December 1983 and on each and all of his subsequent appointments; the second concerns his request to change his first fixed-term appointment to a probationary appointment starting 11 December 1983, with appropriate corrections of all subsequent contracts.

The question before the Tribunal is whether, in determining the Applicant's entry level and granting him a fixed-term appointment instead of a probationary appointment at the time of his recruitment, the Respondent acted in accordance with the pertinent Staff Regulations and Rules, established procedures and guidelines.

III. With regard to the correction of his entry level, the Tribunal notes that the applicable rules at the time of his recruitment are contained in Personnel Directive PD/9/59 of 4 March 1959, on "Policy for the Recruitment and Promotion of Translators and Translator-Précis-Writer Trainees", which provides for two possible levels of entry:

According to paragraph I(a) on General Policy:

> "Translators ... are normally recruited as trainees at the Associate Officer (P-2) level by competitive examination in which staff members of the Secretariat may participate as well as 'outside' candidates ...".

According to paragraph II(d) on Outside Recruitment, "fully qualified translators recruited from outside the Secretariat will be engaged ... at the Second Officer (P-3) level ...", a higher entry level.

IV. The Tribunal notes that the Applicant, having succeeded in the Arabic translator's examination held in 1980, was granted a two-year fixed-term appointment on 11 December 1983, as an Associate Translator at the P-2, Step I level, in implementation of paragraph I(a) of PD/9/59.

By a letter dated 18 September 1983, the Applicant had gladly accepted this offer after reading its particulars; at the same time he submitted an updated P.11 Personal History Form.

V. On 18 December 1983, the Applicant, who felt he had been under-estimated, requested his Recruitment Officer to reassess the level and/or step of his appointment, in the light of information contained in his new updated Personal History Form.

VI. On 1 February 1984, the Applicant's Recruitment Officer wrote a memorandum to the Director, Division of Recruitment, concerning correction of the Applicant's entry level. The memorandum states:

> "Subject: Revised salary recommendations - 1980 Arabic Translators
>
> Based on a salary recommendation made on 20 October 1980, offers were made in August 1983 to 12 Arabic Translators still on the 1980 roster of successful candidates. All candidates when made the offer were asked to submit a newly completed Personal History Form in order to update and complete their files. Taking into account the new information provided by two candidates and verified by the

OPS [Office of Personnel Services] I would like to have your approval for the following revised salary recommendations in order to amend my offers:

Mr. Taisseer El Shami (45 years old - Egyptian)

In addition to all the facts taken into account in the 1980 salary recommendation, Mr. T. El Shami has worked as a translator for three months with UNIDO. His job as the Head of the Chemistry Department and then as Vice-Dean of the Faculty of Science of Tanta University included scientific translations (posts held since 1974). I feel Step IV at the P-2 level would be more appropriate than Step I."

VII. By a memorandum dated 6 February 1984, the Applicant was informed that he would be granted three additional steps, i.e. P-2, Step IV, with retroactive effect to his date of entry. The Tribunal notes that all necessary information concerning the Applicant's qualifications and relevant experience was at the disposal of the Administration.

The Tribunal notes that the Applicant could have challenged the determination of his entry level and claimed instead a P-3 entry level, as a fully qualified translator, in accordance with paragraph II(d) of PD/9/59, on two occasions.

VIII. The Applicant could have first appealed, in accordance with Staff Rule 111.2(a), within two months of the administrative decision of 6 February 1984, informing him of the correction of his entry level to P-2, Step IV. But he failed to do so.

Moreover, the Applicant had ample time to acquaint himself with the rules applied in determining entry level. He had in fact one year from the date of his initial appointment, ramely by 11 December 1984 at the latest, within which to preserve his right to correct his entry level, by submitting the written claim required by Staff Rule 103.15 governing retroactive payment of an entitlement. But he failed to do so.

The Tribunal recalls its Judgement No. 392, Joiner (1987). In paragraph V, it was stated:

"The Tribunal notes in this respect, that Staff Rule 103.15 clearly requires a claim submitted in writing, as

> the only way of preserving the staff member's rights beyond the one year time-limit, and as a condition precedent to his receiving payment. Consequently, the failure to file a claim in writing within the time-limit deprives the staff member of any possibility of receiving a retroactive payment, irrespective of the reasons he may have had for not complying in due time with the requirements set forth by the Staff Rule." (Emphasis added)

IX. In paragraph VI of the said Judgement, the Tribunal stated:

> "... Even if such rule had never been invoked by the parties, the Tribunal would have to apply it ex-officio, in order to ensure that retroactive payments are granted only in accordance with the rule. In this respect, the Tribunal recalls its Judgement No. 281 (Hernández de Vittorioso)."

Therefore, the Applicant's attempt later on to re-open the determination of his entry level on the ground that it compared unfavourably with other members of his service, cannot be entertained by the Tribunal.

X. The Tribunal finds that the Applicant failed to avail himself, within the prescribed time-limits, of the recourses available to him under the Staff Rules. Accordingly, the entry level of his first appointment, commencing on 11 December 1983, had been determined properly, according to the Staff Rules, established procedures and guidelines, and therefore the Applicant's request to review this entry level must fail.

XI. Having forfeited his right to challenge the determination of the entry level of his first appointment, the Applicant, on 10 December 1986, submitted a request for correction of the entry level of his second appointment, commencing on 11 December 1985.

He justifies the receivability of this second request, arguing that his second letter of appointment constituted a new offer of employment and not a renewal or extension of his fixed-term appointment, which by its nature is non-renewable according to Staff Rule 104.12(b). Consequently, the Applicant contends that 11 December 1985 was his new date of entry on duty, thus providing him with a new opportunity to challenge the entry level

of his second appointment. According to this interpretation, the Applicant claims that the rule providing that requests for reviewing entry level can only be entertained within one year of the date of the new letter of appointment, cannot be invoked against him.

XII. The Tribunal cannot subscribe to the Applicant's interpretation of Staff Rule 104.12(b), which assumes that renewal is totally incompatible with its provisions, for the following reasons:

1. A careful reading of the rule shows that it does not absolutely exclude renewal but it speaks of something less, of "no expectancy of renewal", a different thing.

2. The clause providing "no expectancy of renewal" is addressed to the holder of a fixed-term appointment, to warn him in advance that he should not rely on his fixed-term appointment to claim a right to an extension thereof. But this clause was not meant to limit the statutory discretionary power of the Secretary-General to retain a staff member, holder of a fixed-term appointment, in U.N. service, by granting him one or more successive fixed-term appointments.

The procedure used and firmly established to express the Secretary-General's determination to retain a staff member on a fixed-term appointment in U.N. service is the act of renewal of his fixed-term appointment. The new fixed-term appointment is not intended to recruit the staff member anew, but to continue his period of service which commenced on the date of his entry on duty, as provided in his initial letter of appointment. Such an arrangement explains why staff members on successive fixed-term appointments benefit from the entitlements provided for in the Staff Rules which are dependent on the continuation of service, like seniority, home leave, credit for sick leave, repatriation grant, etc.

XIII. To sustain his argument that a renewal is a new contract, the Applicant invokes paragraph X of Judgement No. 422, Sawhney (1988), in which the Tribunal stated: "... after the expiration date of a fixed-term appointment, there is no automatic renewal, but a new contract must be concluded to keep the staff member in the service of the United Nations".

The true meaning of this Judgement is that a new contract is required to maintain the staff member in the service of the United Nations, not to initiate a new relationship between the Organization and the staff member.

XIV. The Tribunal therefore cannot subscribe to the Applicant's interpretation, that each and every fixed-term appointment he was granted after 11 December 1983, is a new appointment and consequently opens the way to correction of the entry level indicated in letters of appointment subsequent to the first one.

XV. With regard to the second central issue, the Applicant claims that the Respondent, by granting him a fixed-term appointment on 11 December 1983, has wrongly denied him a probationary appointment.

The Tribunal will consider whether the Respondent in so doing has acted properly, according to the pertinent rules.

XVI. To justify his refusal to grant the Applicant a probationary appointment, the Respondent claims among other things that, at the time of his recruitment, the Applicant was on secondment from Tanta University, a governmental institution. Therefore, in the Respondent's view, it was proper to grant the Applicant a fixed-term appointment in accordance with Staff Rule 104.12(b), which provides that "the fixed-term appointment ... may be granted ... to persons recruited for service of prescribed duration, including persons temporarily seconded by national governments or institutions for service with the U.N.".

The Applicant on his part asserts that at the time of his recruitment he was not on secondment from his Government, that his status was one of "leave of absence", which is not a secondment and that he was therefore entitled to a probationary appointment.

XVII. The Tribunal observes that according to its jurisprudence in its Judgement No. 92, Higgins (1964) and Judgement No. 192, Levcik (1974), a staff member who is seconded from his Government serves on the basis of a

tripartite agreement between the releasing organization, which is, in this case, Tanta University in Egypt, the receiving organization, which is the U.N., and the staff member concerned.

The Tribunal will ascertain if each of the three parties had actually given his consent to the status of secondment at the time of the Applicant's initial appointment in 1983.

XVIII. With regard to the U.N. Administration, the Tribunal finds that:

1. In the first offer of appointment dated 24 August 1983, for a two-year fixed-term appointment, it is nowhere mentioned that the Applicant was seconded from the Government of the Arab Republic of Egypt.

2. In a letter dated 24 August 1983, the Secretariat of the U.N. merely informed the Permanent Mission of the Arab Republic of Egypt to the United Nations that the Applicant, a national of Egypt, had been offered a two-year fixed-term appointment, without soliciting the Government's consent to his secondment.

3. In his initial letter of appointment of 11 December 1983, signed by both parties, the Respondent did not include the usual formal mention of secondment. When, two months later, a new letter of appointment was signed to reflect the correction made in the Applicant's entry level, no mention was made of secondment either. Moreover, the two corresponding P.5 action forms failed to specify that the Applicant was on secondment.

XIX. With regard to Tanta University, there is nothing in the Applicant's personnel file showing that it expressly agreed to the Applicant's secondment.

XX. With regard to the Applicant, the Tribunal does not find documentary evidence that his consent to a secondment had been obtained or sought with regard to his initial appointment.

XXI. From the foregoing analysis, the Tribunal finds that, at the time of his initial appointment, the Applicant was not on secondment, due to the non-existence of an agreement between the three parties concerned, which is an essential requirement for a secondment.

XXII. The question still remains whether the Applicant, in this case, was entitled to a probationary appointment, and whether the Respondent had a corresponding obligation to grant him such an appointment according to the pertinent regulations and rules.

According to Staff Regulation 4.5(b):

> "The Secretary-General shall prescribe which staff members are eligible for permanent appointments. The probationary period for granting or confirming a permanent appointment shall normally not exceed two years, provided that in individual cases the Secretary-General may extend the probationary period for not more than one additional year."

Regulation 4.5(a) provides that:

> "... Other staff members [than Under-Secretaries-General and Assistant Secretaries-General] shall be granted either permanent or temporary appointments under such terms and conditions consistent with these regulations as the Secretary-General may prescribe."

Staff Rule 104.12(a) provides that probationary appointments:

> "... may be granted to persons under the age of 50<years who are recruited for career service ...
>
> At the end of the probationary service the holder of a probationary appointment shall be granted either a permanent or a regular appointment or be separated from the service."

XXIII. From these provisions, the Tribunal concludes that:

1. The granting of probationary appointments is left to the discretionary authority of the Secretary-General in the absence of prejudice, improper motivation or any other extraneous reason.

In this connection, the Tribunal recalls paragraph IV of its Judgement No. 205, El-Naggar (1975) in which it stated:

> "The Tribunal observes that under Article 101 of the Charter the power of appointment rests with the Secretary-General. The type of appointment to be offered to a staff member is within the discretion of the Secretary-General. Neither the exceptional competence of a staff member nor favourable recommendations for a particular type of appointment by themselves create an entitlement to such an appointment. Furthermore, the Tribunal holds that its

competence does not extend to an examination of the reasons for the issue or refusal of a particular type of appointment to a staff member in the absence of entitlements in this regard."

2. According to Staff Rule 104.12(a), the Tribunal notes that a probationary appointment is assigned a specific function; viz. to provide a career service in the U.N.

XXIV. The Tribunal notes that under the umbrella of the above-mentioned provisions, the Respondent invokes the established policy not to grant a probationary appointment to anyone involved in a subsisting employment relationship with another party, since a U.N. career service associated with a permanent appointment, is inconsistent with a subsisting employment relationship with another party.

The Tribunal considers that this established policy is a reasonable interpretation of Staff Regulations and Rules regulating the granting of probationary appointments.

XXV. The Tribunal observes that there is no dispute that the Applicant, at the time of his initial appointment, and throughout his employment with the United Nations, had been a permanent member of the Civil Service of his Government, at Tanta University, albeit on leave of absence.

The Applicant had the right to revert to employment within his establishment of origin, Tanta University, and his institution had the right to recall him to active service, as it actually did when his leave of absence ended on 18 July 1988.

It follows, that in these circumstances, when the Respondent granted the Applicant a fixed-term and not a probationary appointment, it was a valid exercise of his discretion.

It follows also, that as long as the Applicant was maintaining his ties with his University, it was proper for the Respondent to grant him a fixed-term appointment. Moreover, Section II of PD/9/59 confirms this analysis when it states: "(a) Staff recruited from outside the Secretariat

will normally be engaged as staff members on probationary appointments ...". The qualification by the word "normally" indicates that there is no commitment on the part of the Organization to grant such appointments in all cases.

XXVI. The Applicant invokes the benefit of Section IV, para. V, of the General Assembly Resolution 37/126 in which the Assembly decided that:

> "Staff members on fixed-term appointments upon completion of five years of continuing good service shall be given every reasonable consideration for a career appointment."

The Tribunal notes that the Under-Secretary-General for Administration and Management, in his letter to the Applicant dated 16 November 1988, almost a month before the completion of the five years of continuing good service, had already started the process of consideration of the Applicant for a career appointment. Such a process led to the granting to the Applicant of a probationary appointment on 1 June 1989, following the severance of his ties with Tanta University.

XXVII. The Applicant questioned the consistency of the Respondent's established policy not to grant probationary appointments to staff permanently employed by another party, before severance of their ties with that other party. He cited as an example the case of one of his colleagues. The Tribunal requested a clarification from the Respondent on this subject. The Tribunal is satisfied from the clarification received, that the colleague in question was not granted a probationary appointment until he had resigned from his post with his Government.

XXVIII. Moreover, the Tribunal does not find in this case any evidence of prejudice, improper motivation or any other extraneous reason vitiating any of the Respondent's decisions concerning the Applicant.

XVIII. For the foregoing reasons, the application is rejected in its entirety.

(Signatures)

Ahmed OSMAN
Vice-President, presiding

Arnold KEAN
Member

Francisco A. FORTEZA
Member

Geneva, 23 May 1990

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED NATIONS

AT

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 482

Cases No. 541: QIU
No. 544: ZHOU
No. 545: YAO

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Roger Pinto, President; Mr. Jerome Ackerman, First Vice-President; Mr. Ahmed Osman, Second Vice-President;

Whereas, on 28 February 1990, Rong Qiu, Kefu Zhou and Jiping Yao, former staff members of the United Nations, filed an application, the pleas of which read as follows:

"II. Pleas

6. The Applicants seek to be reinstated as staff members of the United Nations. They submit that the Respondent should have maintained them in service after 31 January 1990 in accordance with the Charter of the United Nations, the Staff Regulations and Rules, the relevant General Assembly resolutions as well as their own excellent record after more than five years of employment with the Organization and the recommendation of the Department of Conference Services that they be granted probationary contracts. The Applicants respectfully request the Tribunal to rescind the Respondent's decision of 15 January 1990 not to renew their contracts or offer new ones and to direct the Respondent to reinstate them as United Nations staff members.

7. In that connection, the Applicants request the Tribunal to recognize:

(a) That the denial by the Respondent of further employment for the Applicants was illegal because the Applicants were not given every reasonable

consideration in contravention of General Assembly resolution 37/126, Section IV, paragraph 5, according to which staff members on fixed-term appointment upon completion of five years of continuing good service should be given every reasonable consideration for a career appointment;

(b) That the Applicants had a legal expectancy of renewal of their contracts;

(c) That the Applicants were not given the true reasons for the denial of further employment and, moreover, that the reasons they were given were entirely unfounded or irrelevant and did not support the Respondent's decision;

(d) That the Respondent's decision was arbitrary, based on considerations contrary to the Charter, and constituted abuse of power;

(e) That the non-observance by the Respondent of his obligations under the Charter, the Staff Regulations and Rules and relevant General Assembly resolutions also constituted illegal discrimination vis-à-vis the Applicants.

8. The Tribunal is also requested:

(a) To order payment to the Applicants of salary lost during the period of unemployment between the expiry of their contracts and the reconstitution of their careers; and

(b) To declare that the Applicants are entitled to reimbursement from the Tax Equalization Fund of the monies which the Applicants were required to surrender to the Chinese Mission from their United Nations salaries."

Whereas the Respondent filed his answer on 6 April 1990;

Whereas the Applicants filed written observations on 1 May 1990, in which they submitted further pleas as follows:

"30. For the reasons mentioned above and in the original brief, the Applicants respectfully request the Tribunal to decide on their pleas in the affirmative and to order their reappointment as career staff retroactively from 1 February 1990.

31. Alternatively, Applicants request that the Tribunal order the cases to be referred to the Appointment and Promotion Committee of the Appointment and Promotion Board [APB/APB] in accordance with the original departmental recommendations and with normal procedure.

32. In the event of compensation being paid in lieu of reappointment or reference to APC/APB, Applicants request the granting of award in the amount of three years net base salary in view of the special circumstances of the case."

Whereas, on 4 May 1990, the Tribunal put questions to the Respondent and requested the production of certain documents;

Whereas, on 8 May 1990, the Respondent submitted some of the documents requested by the Tribunal and answered the Tribunal's questions;

Whereas, on 11 May 1990, the Respondent submitted a further document;

Whereas the facts in the case are as follows:

The Applicants, Rong Qiu, Kefu Zhou and Jiping Yao, nationals of the People's Republic of China (China) and former students of the Beijing Institute of Foreign Languages, passed the 1984 United Nations Competitive Examination for Chinese Verbatim Reporters. The Applicants Qiu and Yao were recruited on 16 September 1984. The Applicant Zhou was recruited on 21 September 1984. The three Applicants were offered five-year fixed-term appointments at the P-2, Step IV level, as Verbatim Reporters in the Department of Conference Services (DCS). Their letters of appointment stated, as a special condition, that they were "on secondment from the Government of China".

During the course of their employment with the United Nations, the Applicant Qiu's overall performance was rated as "very good" and "excellent" and the Applicant Yao's and the Applicant Zhou's overall performance was rated as "very good". The three Applicants were promoted to the P-3 level, effective 1 September 1986.

In a memorandum dated 1 May 1989, the Administrative Officer, DCS, requested the Personnel Officer in the Office of Human Resources Management (OHRM) that six Chinese Verbatim Reporters, including the Applicants Qiu and Yao, who were on secondment from the Government of the People's Repulic of China (the Chinese Government) and whose appointments were due to expire on

15 September 1989 "be granted probationary appointments". She confirmed that they encumbered "core posts for the 1990-1991 Biennium", i.e., posts provided for in the budget and against which career appointments could be granted. In a memorandum dated 26 June 1989, the Administrative Officer, DCS, informed the Personnel Officer that the Applicant Zhou's fixed-term appointment was due to expire on 20 September 1989 and that, in view of his satisfactory performance, DCS, recommended that his appointment be converted to probationary. Subsequently, in July 1989, the Office of Programme Planning, Budget and Finance informed OHRM that the Applicant Zhou was encumbering a core post. Nevertheless, the Administration did not submit the three recommendations for a probationary appointment to the appropriate appointment and promotion bodies. In a handwritten note inserted on the 1 May 1989 memorandum from DCS to OHRM, the Personnel Officer wrote: "DCS has informed me on 10.8.89 [10 August 1989] to request from the Government of China an extension of appointment for two years."

In three notes verbales dated 11 August 1989, addressed to the Permanent Mission of the People's Republic of China (the Chinese Mission), the Secretary-General asked the Chinese Government to extend the Applicant Qiu's and the Applicant Yao's secondment until 15 September 1991 and the Applicant Zhou's secondment until 20 September 1991. In three separate replies dated 23 August 1989, the Chinese Mission informed the Secretariat that the Chinese Government had consented to the extension of the three Applicants' secondment until 31 December 1989 only. Each of the three letters stated: "[A] recommendation from the Chinese Government for his successor will be communicated to the Secretariat in a separate note".

In a letter dated 1 October 1989, the Applicant Qiu requested the Assistant Secretary-General, OHRM, to grant him a career appointment in accordance with paragraph 5 of Section IV of General Assembly resolution 37/126, which provides that "staff members on fixed-term appointments upon completion of five years of continuing good service shall be given every reasonable consideration for a career appointment", and with paragraph 5 of Section VI of General Assembly resolution 38/232, in which the Assembly "recommends that the organizations normally dispense with the requirement for a probationary appointment as a prerequisite for a career appointment

following a period of five years' satisfactory service on fixed-term contracts". He stated that he would immediately resign from any post held in his home country, if this was a requirement for the United Nations to offer him a probationary appointment. Finally, he noted that he feared for his safety and that of his family if he were to return to China, because of his participation in protest activities against the manner in which the Chinese Government had dealt with the student demonstrations in Beijing.

In similar letters dated 2 October 1989, the Applicants Yao and Zhou requested the Assistant Secretary-General, OHRM, to grant them career appointments on the ground that they fulfilled the requirements set forth in General Assembly resolutions 37/126 and 38/232. The Applicant Yao stated that he had "never been associated with the Chinese Government". He also admitted his involvement in the protest against recent events in his home country and said that he would face serious consequences if his employment with the United Nations were terminated and he had to return to his country. The Applicant Zhou argued that as a staff member of the Secretariat, he should not "automatically be denied the right to equal treatment with other staff members because [he came] from a certain country". Furthermore, he asserted that recent events in his country gave him reason to fear for his safety and future if he were to return. He admitted to having been seconded from the Chinese Government but informed the Assistant Secretary-General, OHRM, that he had handed in his resignation to the Foreign Ministry of China in June 1989.

On 13 November 1989, the Applicant Qiu notified the Personnel Department of the Foreign Ministry of China that he would "resign from the Foreign Ministry, effective as of January 1, 1990". On 14 November 1989, the Applicant Yao informed the Chinese Mission that he was unaware "of belonging to any governmental institution or other body" and added that "should the Chinese Government consider otherwise", he would, "as of 1 January 1990, resign from any institution of which it considers me a member ...". On 18 November 1989, the Applicant Zhou wrote to the Personnel Department of the Foreign Ministry of China, offering his "formal resignation to the Foreign Ministry" and stating that he would "cease to be a State employee in the Ministry as of December 31, 1989". He requested a passport as a private citizen.

In his memorandum answering the Tribunal's questions, the Respondent notes that:

> "On numerous occasions [from 1 May 1989 onwards and throughout the General Assembly], officials of the Chinese Mission telephoned and sought out Mr. Riesco [Director, Staff Administration and Training Division, Office of Human Resources Management] in conference rooms and other UN areas and asked for information on staffing in the CLS [Chinese Language Services]. No record of these informal conversations, or the dates on which they were made, exist. The conversations were mainly during the General Assembly period. The Mission repeated its views that the rotational system of staffing in CLS should continue."

In a memorandum dated 13 November 1989, the Director, Staff Administration and Training Division (SATD), OHRM, notified Personnel Officers of the procedures to follow in order to implement the directives contained in General Assembly resolutions 37/126, Section IV, paragraph 5, and 38/232, Section VI, paragraph 5, concerning the conversion to career appointments of fixed-term contracts expiring during the first half of 1990.

In a letter dated 12 December 1989, the Director, SATD, OHRM, informed the three Applicants that their request for a further appointment with the United Nations had "been carefully considered" by DCS and OHRM. He noted in this regard:

> "I appreciate your interest in remaining in the service of the United Nations, but I regret to inform you that the Organization is not in a position to offer you a new appointment at this time.
>
> However, in consideration of the closeness of the date of expiration of your current fixed-term appointment, and in order to afford you more time to make new plans, your present appointment will be extended to 31 January 1990."

On 14 December 1989, the three Applicants wrote to the Secretary-General a letter that reads as follows:

> "We have received letters from Mr. Federico Riesco, Director of Staff Administration and Training Division, denying our requests for career appointments. We are of course deeply disappointed and depressed by this denial.

When the three of us individually spoke out against the Chinese Government's illegal interference and exploitation of Chinese staff members of the United Nations, the least we expected was that the Organization we serve and love would protect the personal safety of staff members who take risks to defend United Nations rules and principles. Instead, it appears we are going to end up jobless and homeless. We cannot believe this is how the United Nations is supposed to be, or how justice is supposed to work.

There are six Chinese verbatim reporters in our unit who were recruited at the same time. When the Chinese Government decided that the three of us must go while the others would have their contracts extended, that was because we had refused to accede to its repeated demands for our salaries. When we turned to the Organization for help and justice, we never suspected that an Organization having such noble purposes and principles would be indifferent in the face of such outrages. We hope we are not too naïve.

We have given Mr. Federico Riesco some material we think will interest you. We have evidence proving that the Chinese Government has been forcing its nationals to hand in their salaries and interfering in the functioning of international civil servants in defiance of the rules that govern the United Nations.

We urgently appeal to you, Sir, to review that material and to intervene personally so that our requests will be reconsidered and decided upon in our favour, in a spirit of humanity and justice."

On 20 December 1989, each Applicant addressed a further identical letter to the Secretary-General as follows:

"I hereby respectfully request a review, under the terms of Staff Rule 111.2(a) and Staff Regulation 11.1, of the decision conveyed to me by the Director, Staff Administration and Training Division, in a letter dated 12 December 1989, a copy of which I attach.

The letter was in response to my letter of 2 October 1989 to the Assistant Secretary-General, Office of Human Resources Management, requesting that I be considered for a career appointment under General Assembly resolutions 37/126, Section IV, paragraph 5, and 38/232, Section VI, paragraph 5. Resolution 37/126 provides that staff members on fixed-term appointment upon completion of five years of continuing good service should be given 'every reasonable consideration' for a career appointment, and resolution 38/232 recommends that the Organization normally dispense

with the requirement for a probationary appointment following a period of five years of satisfactory service on fixed-term appointments. I understand that you have approved a recommendation of SMCC [Staff Management Co-ordination Committee] XIII to give effect to these resolutions, and that the Office of Human Resources Management has directed all Departments to implement the resolutions with respect to staff who have completed five years of continuing good service and whose fixed-term appointments are due to expire. I understand further that consideration for the granting of career appointments should relate to the retrenchment exercise, and that staff encumbering core posts are eligible for consideration.

I have served for over five years with the United Nations Secretariat and have received excellent evaluations throughout. I was informed by my Section Chief, Mr. Baha Fahmy, that he was recommending me for a career appointment. Moreover, the post I am occupying has been designated a core post and is not affected by the retrenchment exercise. I believe, therefore, that I meet all the criteria laid down by the General Assembly for 'every reasonable consideration' for a career appointment.

The letter of 12 December 1989 from the Director, SATD, does not indicate that any consideration was given to my request, much less the serious consideration to which my terms of appointment entitle me. It simply states that the Organization 'is not in a position to offer (me) a new appointment at this time'. No reason is given for this conclusion.

I therefore respectfully request that the decision of 12 December be reviewed, and that while consideration is being given to this request my status with the Organization is preserved, so that I would be in a position to exercise my rights of appeal if necessary. In view of the urgency of the situation, and having regard to relevant United Nations human rights instruments and to the fact that my present contract expires on 31 January 1990, I would appreciate a response as soon as practicable."

On 21 December 1989, the Applicants signed new letters of appointment for fixed-term appointments of one month, effective 1 January 1990 and expiring on 31 January 1990.

On 15 January 1990, the Acting Under-Secretary-General for Administration and Management informed each Applicant that:

"I have been instructed by the Secretary-General to reply on his behalf to the letters that you addressed to him on 14 and 20 December 1989.

I regret that you consider that Mr. Riesco's letter of 12 December 1989 did not show that you had received every reasonable consideration for a further appointment. Let me assure you that your case at that stage received such consideration. Following your request for review of the decision communicated to you in Mr. Riesco's letter of 12 December 1989, a further review was fully and completely conducted in the light of paragraph 5 of section IV of General Assembly resolution 37/126, which gives you the right to every reasonable consideration for a career appointment.

In considering your case, at all stages, your continuing good service as a verbatim reporter was taken into account, as well as the fact that your Department recommended you for a further appointment.

On the other hand, it was also necessary to take into account the interests of the Organization and in particular its functional needs. In this connection, it was important to ensure that the Chinese language services continued to function effectively and efficiently. Since the primary users of those services are representatives of the Government of the People's Republic of China, it is of critical importance for the effectiveness of the services that those representatives have confidence that their statements, both oral and written, will be objectively and fairly rendered, interpreted or reported. Furthermore, the efficient functioning of the Chinese language services would not be possible in a situation where staff members were antagonistic to each other because of expressly stated political animosities.

It would also not be in the interests of the Organization to disrupt the rotational system for the staffing of the Chinese language services, which has proven to be most effective. This system has enabled the establishment of a specialized language training programme at the Beijing Institute for Foreign Languages, the termination of which would make it immensely difficult to recruit language staff with the specific qualifications required to fill vacancies appropriately and expeditiously.

After weighing these factors again, the Secretary-General has confirmed his earlier conclusion as conveyed to you in Mr. Riesco's letter of 12 December 1989.

> As regards the complaints concerning compulsory deductions from your salary, to which you refer in the fourth paragraph of your letter of 14 December, I wish to inform you that the Secretary-General is at present conducting a comprehensive examination of the question of deductions from and supplements to the emoluments of United Nations staff members. This is a matter on which he is already in touch with the International Civil Service Commission and the Member States of the Organization.
>
> Finally, I urge again that you remain in contact with the Staff Counsellor, ..., who has been instructed to offer you appropriate advice and assistance in regard to your future."

On 24 January 1990, the Applicants requested the Secretary-General to authorize them to submit their appeals directly to the Administrative Tribunal under article 7 of its Statute.

On 25 January 1990, the Applicants requested the President of the Tribunal to request the Secretary-General, "as a preliminary measure under article 7.(3)(a) of the Rules of the Tribunal", to grant them special leave without pay until their cases were adjudicated by the Tribunal, which would enable them to remain in the United States lawfully without compromising the Secretary-General's relationship with the host country. On 5 March 1990, the President of the Tribunal decided to reject their preliminary request.

On 8 February 1990, the Secretary-General consented to direct submission of the three appeals to the Administrative Tribunal.

On 28 February 1990, the three Applicants filed with the Tribunal the application referred to earlier.

Whereas the Applicants' principal arguments are that:

1. The Respondent failed to discharge his obligation under Article 100 and Article 101, paragraph 3, of the Charter and General Assembly resolutions 37/126 and 38/232, to give the Applicants every reasonable consideration for a career appointment.

2. Staff members do not serve Governments but, according to Article 100 of the Charter and Staff Regulation 1.1, serve the Organization. They do not have to agree with the policies of Governments in order to carry out their duties with impartiality.

3. The Respondent's decision not to extend the Applicants' appointments was based on illegal considerations, such as the wishes of the Chinese Government.

4. The establishment of a training institute in a Member State may not derogate from or replace Articles 100 and 101 of the Charter or the Staff Regulations and Rules.

Whereas the Respondent's principal arguments are that:

1. The Applicants did not have a legal expectancy of further employment upon expiry of their fixed-term appointments.

2. Appointments on secondment require the consent of all parties to the secondment arrangement. The Respondent properly sought the consent of the Chinese Government to an extension of the Applicants' appointments on secondment.

3. The Secretary-General is bound to give reasonable consideration to granting career appointments to staff on fixed-term appointments (including fixed-term appointments on secondment) with five years of continuing good service, but this requirement does not deprive the Secretary-General of his discretion in deciding whether the grant of career appointments is in the interests of the Organization.

4. The Secretary-General's assessment of the interests of the Organization in considering whether to offer career appointments to the Applicants cannot be challenged except on the basis of prejudice or improper motive.

5. The Respondent did not violate any applicable procedures through the manner in which he gave the Applicants every reasonable consideration for a career appointment.

6. Instructing the Staff Counsellor to extend assistance to the Applicants is an appropriate manner in which to protect their interests.

7. The Applicants' request for a declaration by the Tribunal that they are entitled to payments from the Tax Equalization Fund is not receivable.

The Tribunal, having deliberated from 23 April to 25 May 1990, now pronounces the following judgement:

I. Since the applications by Mr. Qiu, Mr. Zhou and Mr. Yao are related, the Tribunal decides that they should be joined and disposed of in a single judgement.

II. The three Applicants are nationals of the People's Republic of China (China). In 1984, they passed the Competitive Examination for Verbatim Reporters organized by the United Nations Secretariat.

III. The Applicant Qiu had worked as a teacher of English at a school in the province of Canton from 1974 to 1976, and as an employee in the Export Department of the China Machinery Import and Export Corporation (Canton branch) from 1976 to 1978. He left this job when he was admitted to the Beijing Institute of Foreign Languages (hereinafter referred to as "the Institute") in 1978.

IV. The Applicant Yao had mainly taught English, among other subjects, since 1976. His last employer had been the Shanghai Agricultural College. He was admitted to the Institute in October 1982.

V. The Applicant Zhou had not engaged in any profession before entering the Institute. He had been a student at Fudan University in Shanghai. He was recruited under the same conditions as the two other Applicants, but on 21 September 1984.

VI. The Tribunal notes that the Applicant Yao's personnel file contains the contract accepted by students on entering the Institute. It is entitled "Agreement for Students" and includes the following provisions, which, in the opinion of the Tribunal, also apply to the two other Applicants:

> "1. ... You are hereby invited by the United Nations to attend the United Nations Training Course for translators and interpreters at the Beijing Institute ... This offer is made to you subject to your acceptance of the following conditions:

1. For the duration of the Course, or until such time as the Institute decided that your continued participation would not serve the purpose of this Course:

(a) You will receive a stipend from the Institute on behalf of the United Nations;

(b) You will attend all classes and devote full time to studies connected with the Course; you will not undertake any other work, studies or employment, except with the prior permission of the Head of the Institute in consultation with the United Nations;

(c) You will do as much translation work for the United Nations as you may be assigned by the Head of the Course in accordance with the curriculum.

2. Upon completion of the Course you will take the recruitment examination given at a date to be determined by the United Nations in consultation with the Institute.

3. If you successfully pass the recruitment examination and are selected for employment with the United Nations, the United Nations will offer you an appointment subject to a satisfactory medical examination. You will agree to accept such appointment, subject to the United Nations Staff Regulations and Rules, for a minimum period of five years, and to perform duties of an interpreter or a translator, at the Headquarters of United Nations or at any of its offices to which you may be assigned.

You will normally be appointed initially at a P-2 level and will normally be promoted to the P-3 level after completing two years of satisfactory service.

4. Prior to appointment by the United Nations, you will not have the status of a staff member of the United Nations, and your rights, benefits, and entitlements will be strictly limited to those specified herein.

(Signature)
Head, Beijing Institute

To the Head, Beijing Institute of Foreign Languages

I hereby accept the above offer and solemnly undertake to fulfil the conditions set out in paragraphs 1, 2 and 3 above.

(Signed)
Yao/Trainee"

VII. In 1984, after passing the examination, the three Applicants applied for jobs as verbatim reporters. The Department of Conference Services (DCS) requested the Office of Human Resources Management (OHRM) to offer them posts as verbatim reporters for a fixed-term of five years. The letters of appointment accepted by the Applicants Qiu and Yao specified that the appointments would be from 16 September 1984 and would expire on 15 September 1989; the Applicant Zhou's appointment would be from 21 September 1984 and would expire on 20 September 1989. In the "Special Conditions" section of each contract it is noted: "On secondment from the Government of China". The Tribunal notes that no details concerning the nature and conditions of the employment with the Chinese Government from which the Applicants were seconded are given in the letters of appointment or in other documents submitted by the Administration.

VIII. Neither has the Administration produced any agreement concluded with the Chinese Government, such as envisaged in the Tribunal's case-law referred to below, concerning the secondment of the Applicants nor any document in which the competent authorities define the Applicants' situation in writing and specify the conditions of secondment. The Tribunal notes that no details are given concerning the Applicants' posts in their own country nor of the conditions governing their reintegration into those posts. It also notes that if such an agreement did exist, it was not brought to the Applicants, for their consent.

IX. The Applicants have duly taken and signed the oath required of every United Nations staff member:

> "... to exercise in all loyalty, discretion and conscience the functions entrusted to me as an international civil servant of the United Nations, to discharge these functions and regulate my conduct with the interests of the United Nations only in view, and not to seek or accept instructions in regard to the performance of my duties from any Government or other authority external to the Organization."

X. On 1 May 1989, the Administrative Officer, DCS, wrote to the competent Personnel Officer, OHRM, concerning the Applicants Qiu and Yao, and on 26 June 1989, concerning the Applicant Zhou, whose appointments would

expire in September 1989, requesting that they be granted probationary appointments. She noted that the Applicants held core posts for the 1990-1991 Biennium against which career appointments could be granted.

A handwritten annotation entered by the Personnel Officer on 10 August 1989, on the memorandum of 1 May 1989, stated, however, that: "DCS has informed me on 10.8.89 (10 August 1989) to request from the Government of China an extension of appointment for 2 years."

XI. The annotation does not explain the underlying motivation for it. The explanations offered by the Respondent in his communication dated 8 May 1990, addressed to the Tribunal, are neither satisfactory nor supported by documents. In the opinion of the Tribunal, these explanations are not borne out by the various documents produced by the Respondent at the request of the Tribunal.

XII. In three notes verbales dated 11 August 1989, the Secretary-General asked the Permanent Mission of the People's Republic of China to the United Nations (the Chinese Mission) to extend the Applicants' secondment for two years. But on 23 August 1989, the Chinese Mission informed the Secretariat that "the Chinese Government has consented to the extension of Mr. Qiu's secondment through 31 December 1989". It added that a "recommendation from the Chinese Government for his successor will be communicated to the Secretariat in a separate note". The same reply was made with regard to the Applicants Yao and Zhou.

XIII. The appointments of the three Applicants were eventually extended from 1 to 31 January 1990.

XIV. The three Applicants gave complete satisfaction in the performance of their functions in the United Nations, particularly during 1989 and until the date of their separation from service on 31 January 1990. There was no allegation of any sign of antagonism towards other colleagues, certainly not Chinese colleagues. There was no sign of political animosity.

XV. The Tribunal notes that, on the occasion of their separation from service, the three Applicants received a letter dated 20 February 1990, which, in particular, drew their attention to the following point:

> "1. Under the United States Government regulations, a staff member's authorized stay in the United States expires automatically upon separation from service or transfer to a duty station outside of the United States, even if the G-4 visa stamped in the passport indicates it is valid beyond the separation or transfer date. However, if additional time is required, the application must be made in writing directly to the Travel Control Section, United States Immigration and Naturalization Service, 26 Federal Plaza, New York, N.Y. 10267. Proof of date of separation from service or of date of transfer must accompany the application".

The three Applicants made known their intention to remain in the United States of America in order to continue their studies.

XVI. In the light of these facts noted by the Tribunal, the Applicants request the Tribunal:

1. To rescind the Respondent's decision of 15 January 1990, not to renew their contracts or offer them new ones, particularly probationary contracts, with a view to career appointments, and to order payment to the Applicants of the salaries which were not paid to them between the expiry of their contracts and their reinstatement in their careers;

2. To declare that the Applicants are entitled to reimbursement from the Tax Equalization Fund of the monies which they were required to remit to the Chinese Mission out of their United Nations salaries.

XVII. The Respondent contests the receivability of the Applicants' request that the Tribunal should declare that they are entitled to payments from the Tax Equalization Fund. The Tribunal will first consider this claim of non-receivability.

XVIII. On 24 January 1990, the Applicants requested the Secretary-General to authorize them to submit directly to the Tribunal their applications challenging the decision of 15 January 1990, not to renew their contracts

beyond 31 January 1990. This authorization was given on 8 February 1990. Neither the request for authorization addressed to the Secretary-General nor the letter addressed by the Applicants on 25 January 1990, to the President of the Tribunal made mention of a claim for reimbursement of the monies levied by the Chinese Mission on their United Nations salaries. The Tribunal considers that the Secretary-General could not have agreed to submit directly to the Tribunal a claim of which he was not seized.

There can be no doubt that the Applicants' pleas concerning this claim exceed the terms of the agreement reached. Accordingly, they are not receivable.

XIX. Moreover, the Respondent observes that the Applicants' claim was submitted to him on 20 March 1990, after the submission of the applications to the Tribunal (28 February 1990). The claim is under consideration. Hence, there is no decision to be challenged.

XX. On the merits, the Applicants maintained, in their applications instituting these proceedings, that they had a legal expectancy of renewal of their fixed-term contracts or alternatively, a career appointment.

XXI. With regard to the renewal of the Applicants' fixed-term contracts, the Respondent maintains that, since they were on secondment, such renewal was subject to the agreement of the Chinese Government. As this agreement was not obtained, the Respondent concluded that the decision not to renew the contracts in question was in conformity with the applicable rules and with the case-law of the Tribunal (Judgement No. 192, Levcik (1974)).

XXII. The Tribunal will apply its case-law on secondment, in the light of the principles reiterated in paragraph V of Judgement No. 192, cited by the Respondent.

XXIII. The Tribunal finds that the conditions laid down for an official to be on secondment are not fulfilled in this case. The Applicants' status was not, in fact, "defined in writing by the competent authorities in documents

specifying the conditions and particularly the duration of the secondment". Such documents, if they exist, have not been brought to the attention of the Applicants. The Applicants were not on genuine secondment within the meaning given to that term in Judgement No. 192, which reaffirms the definition established in Judgement No. 92, Higgins (1964): "... the term 'secondment' ... implies that the staff member is posted away from his establishment of origin but has the right to revert to employment in that establishment at the end of the period of secondment and retains his right to promotion and to retirement benefits ..." (Judgement No. 192, para. IV).

XXIV. As stated in Judgement No. 192, cited by the Respondent, it is only when these conditions are fulfilled that "the Secretary-General of the United Nations, as the administrative head of the Organization, is obliged to take into account the decision of the Government".

The Judgement adds, and the Tribunal can only reiterate and endorse this reasoning:

> "Bearing in mind the provision in Article 100 of the Charter that 'in the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any Government or from any other authority external to the Organization', the Tribunal considers that in the absence of a secondment agreed to by all parties concerned in conformity with the above-mentioned principles, the Respondent cannot legally invoke a decision of a Government to justify his own action with regard to the employment of a staff member" (Judgement No. 192, para. V).

XXV. The Tribunal finds that the secondment of the Applicants was not effected in conformity with the principles applicable. Secondment is an objective situation. It is not for the United Nations Administration or the Government in question or staff members to invoke a secondment which does not exist. Accordingly, the Tribunal considers that it was not for the Respondent either to request authorization of, or to comply with the decision of a Government in order to renew the Applicants' contracts. This being so, the Tribunal finds that the decision not to renew the Applicants' fixed-term contracts was vitiated by extraneous reasons contrary to the interests of the United Nations, incompatible with Article 100 of the Charter.

The Applicants have also requested the Tribunal to recognize their right to a career appointment. Their pleas in this regard will now be examined by the Tribunal.

XXVI. Concerning their claim to career appointments, the Respondent acknowledges that the Applicants "upon completion of five years of continuing good service ... had a right to every reasonable consideration to a career appointment".

XXVII. The Respondent recalls that the Secretary-General has discretionary powers when deciding whether granting a career appointment is in the interest of the Organization. At the same time, he acknowledges his discretion is not unlimited.

XXVIII. The Respondent cites, in this connection, an excerpt from Judgement No. 333, Yakimetz, para. XIX (1984), in which the Tribunal expresses itself in the following terms:

> "In Judgement No. 54 (Mauch) [1954], the Tribunal stated that:
>
> 'While the measure of power here was intended to be left completely within the discretion of the Secretary-General, this would not authorize an arbitrary or capricious exercise of the power of termination, nor the assignment of specious or untruthful reasons for the action taken, such as would connote a lack of good faith or due consideration for the rights of the staff member involved'".

The Applicants also invoke this precedent in support of their application.

XXIX. More generally, the Tribunal considers that the limits of the Secretary-General's discretionary powers are governed by the following principle established by the Tribunal's consistent case-law: the Secretary-General may not legally take a decision which is contrary to the Charter, in particular to Articles 100 and 101, or to the provisions of the Staff Rules and Regulations.

XXX. In this connection, the Tribunal agrees with the Respondent that the Secretary-General has the right to consult the Governments of Member States when he exercises his power of appointment, provided however that such consultation should not contravene the principles referred to in the preceding paragraph.

As the Tribunal states below, it holds that, in the present case, by accepting the position advocated by the Government consulted, the Secretary-General has not acted in conformity with the foregoing principles.

XXXI. Nevertheless, the Tribunal does not hold that the Secretary-General could not, in proper circumstances, take into consideration the requirements of the efficient functioning of the Beijing Institute of Foreign Languages. The Secretary-General stressed, in his letter of 15 January 1990, that the termination of the specialized language training programme "would make it immensely difficult to recruit language staff with the specific qualifications required to fill vacancies appropriately and expeditiously". As the Tribunal shows below, in this case, the alleged adverse effect on the efficient functioning of the Institute and on recruitment is pure speculation. It appears to the Tribunal also, that there might be other sources for the recruitment of qualified language staff.

XXXII. The Tribunal notes that there is no evidence in the files to support the existence of a threat to suppress the programme in question if the Applicants received career appointments. The Tribunal finds it difficult to understand why, if there had been such a threat, DCS should, on 1 May 1989, have asked OHRM to grant probationary contracts to six Chinese-language verbatim reporters prior to career appointments.

XXXIII. In keeping with the wishes expressed by the Chinese Mission, there is nothing to prevent the maintenance of a rotation system. The Tribunal considers that a rotation system is not unlawful per se. Such a system can and must serve the interests of the United Nations and the Member State concerned by providing a pool of Chinese-language translators, verbatim reporters and interpreters, while at the same time developing their

knowledge and command of foreign languages. Such training will be very useful in the development of relations between the United Nations and China when those experts return home permanently.

But in the opinion of the Tribunal, the rotation system must be established on a precise legal basis - through secondment in accordance with the terms governing secondment and without ruling out career appointments, pursuant to General Assembly resolution 37/126.

XXXIV. Accordingly, the Tribunal can only reject the Respondent's contention that the mere existence of the rotation system would prohibit career appointments.

XXXV. The Tribunal appreciates the Administration's concern that "it is of critical importance ... that [the] representatives [of China] have confidence that their statements, both oral and written, will be objectively and fairly rendered, interpreted or reported".

XXXVI. But the Tribunal notes that during the period when the career appointments of the Applicants were considered, i.e. from 1 May 1989, to the termination of their services on 31 January 1990, no observation was made, and no complaint levelled against them concerning their performance. The reason invoked by the Administration for denying appointments to the Applicants is based on an inaccuracy, if not an error.

XXXVII. The Tribunal has also taken into account the terms of the letter addressed to the Applicants on 15 January 1990, on behalf of the Secretary-General, by the Acting Under-Secretary-General for Administration and Management:

> "The efficient functioning of the Chinese language services would not be possible in a situation where staff members were antagonistic to each other because of expressly stated political animosities."

But the Tribunal notes that no act of this nature has been alleged against the Applicants. It notes moreover that the Applicants have never failed to maintain the discretion incumbent upon them as international civil

servants. Even during 1989, no such complaint against them was made by their Government. Lastly, the Tribunal notes that nothing has been shown to indicate the possibility of such a problem arising in the future.

XXXVIII. In the opinion of the Tribunal, the Respondent's assumptions in this respect lack any factual basis. The Applicants' record as international civil servants, as recognized by the Administration itself, shows that they are devoid of any substance. They constitute arbitrary suspicions on the future conduct of the Applicants. The Applicants are being disciplined by the denial of appointments, for potential misconduct. The Tribunal considers that the Applicants are being tried for their imputed intentions. An attitude of irresponsibility is ascribed to international civil servants who, during many years of service, have not given the slightest justification for such a charge.

XXXIX. The Tribunal moreover recalls that the Secretary-General has the necessary powers to prevent any irresponsible conduct on the part of the staff under his authority.

XL. The Respondent acknowledges that discussions took place with representatives of the Chinese Mission throughout the period beginning on 1 May 1989. The Tribunal takes note that following those discussions, the Secretary-General denied the Applicants career appointments on 12 December 1989.

XLI. The Tribunal finds that the Secretary-General accepted the Chinese Mission's position that the Applicants should be denied an extension of their fixed-term contracts or be offered career appointments.

The Tribunal has shown that, in the absence of the necessary criteria for secondment consistent with case-law, it was not permissible for the Secretary-General to take into account the Chinese Mission's opposition to the renewal of the fixed-term contracts.

As regards career appointments, the Tribunal considers that these were withheld because of the Chinese Mission's position concerning the rotation system. The Tribunal notes that, in the opinion of the Chinese

Mission, the rotation system categorically ruled out career appointments. The Tribunal considers that the Secretary-General could not defer to this opposition by the Chinese Mission without being in breach of his obligations under the Charter and the Staff Rules and Regulations, as well as under General Assembly resolutions 37/126 and 38/232 (see para. XXXIII).

XLII. Consequently, the Tribunal finds that the Secretary-General's decision to refuse the Applicants' request for career appointments exceeds the limits of his discretion. His decision is based on reasons which are contrary to the interests of the United Nations, erroneous or inaccurate as to fact, and specious. It ignores the basic principles of the international civil service, as enunciated in Articles 100 and 101 of the Charter.

XLIII. The Tribunal considers that the Secretary-General wrongly refused the Applicants career appointments, contrary to General Assembly resolutions 37/126 and 38/232. The decision of 12 December 1989, as confirmed on 15 January 1990, in respect of the three Applicants must therefore be rescinded, and career appointments granted to them with effect from 1 February 1990.

XLIV. The Tribunal notes that the Applicants have contended that they were not considered in accordance with the procedure established in the memorandum dated 13 November 1989, from the Director of the Staff Administration and Training Division, OHRM, addressed to all Personnel Officers, with a view to giving effect to General Assembly resolutions 37/126 and 38/232, and that accordingly the denial of career appointments was also vitiated by the lack of due process. However, the Tribunal takes the view that there is no need to examine that point. It has found the Secretary-General's denial of career appointments invalid on other grounds.

XLV. In accordance with article 9, paragraph 1, of its Statute, it is for the Tribunal to fix the amount of compensation to be paid to each Applicant for the injury sustained should the Secretary-General, within 30 days of the notification of the judgement, "decide, in the interest of the United Nations, that the applicant shall be compensated".

XLVI. With regard to the injury sustained, the Applicants estimate it, for each of them, as the net amount of their base salary for a period of three years. The compensation thus requested exceeds by one year's salary the maximum amount which the Tribunal would normally award.

The Tribunal considers that this is an "exceptional case" justifying the payment of higher compensation. The Tribunal notes that the Applicants have displayed outstanding professional ability and competence in the performance of their duties, that they had a reasonable expectancy of permanent employment and a career in the United Nations, that after offering them a career appointment the Administration proposed a two-year renewal of contract and then withdrew the offer, and that this vacillation constituted a particularly painful mental ordeal for the Applicants in the then prevailing circumstances, that the Administration has not acted in the Applicants' case with the prudence, care and attention to be expected of an international organization with regard to personnel questions, and lastly, that the rule that compensation may not exceed two years' net base salary would not, in this case, adequately compensate the Applicants for the injury they have sustained and will sustain if they are not granted career appointments.

XLVII. The Tribunal considers that there is no need in this case to rule on the question of the privilege claimed by the Respondent regarding certain communications between the Secretary-General and the Chinese Mission which the Tribunal had asked him to produce.

XLVIII. For these reasons, the Tribunal:

1. Declares that the Applicants' pleas for the reimbursement by the Tax Equalization Fund, of the monies which they remitted to the Chinese Mission from their United Nations salaries are not receivable at this stage.

2. Rescinds the decision taken by the Secretary-General on 12 December 1989, and confirmed on 15 January 1990, not to grant the Applicants career appointments in the circumstances provided for in General Assembly resolutions 37/126 and 38/232, and decides that they should be granted such appointments as from 1 February 1990.

3. Fixes the compensation to be paid to each of the Applicants at three years' net base salary of the Applicants as at the date of their separation from service, if the Secretary-General decides, within 30 days of the notification of the Judgement, in the interest of the United Nations, not to grant the Applicants career appointments.

(Signatures)

Roger PINTO
President

Jerome ACKERMAN
First Vice-President

Ahmed OSMAN
Second Vice-President

Geneva, 25 May 1990

R. Maria VICIEN-MILBURN
Executive Secretary

DECLARATION BY JEROME ACKERMAN

Having signed the Judgement in this case, of course, I agree with it entirely. I should like to note, in addition, that had the Tribunal thought it necessary to address the Applicants' contentions concerning the procedure established by the Administration on 13 November 1989, with respect to General Assembly resolutions 37/126 and 38/232, I would have deemed it axiomatic that such a procedure must observe the requirements of due process including the absence of discrimination. Staff members are surely entitled to this in the implementation of such General Assembly resolutions as well as in other aspects of their employment. Regrettably, I believe that the Applicants were not accorded the due process to which they were entitled.

In my view, it is also regrettable, to put it mildly, that there should be even so much as an appearance that this entire affair might be related to humanitarian pleas made by them.

(Signature)

Jerome ACKERMAN
First Vice-President

Geneva, 25 May 1990